(6)

{SHOW } PROCEEDINGS AND ORDERS DATE: 030685

CASE NBR 84-1-00763 CFX
SHORT TITLE San Filippo, Augustin J. DOCKETED: Nov 9 1984
VERSUS U.S. Trust Co. of NY, et al.

| Date | Proceedings and Orders |
|---|---|
| Aug 30 1984 | Application for extension of time to file petition and order granting same until November 10, 1984 (Marshall, September 4, 1984). |
| Nov 9 1984 | Petition for writ of certiorari filed. |
| Dec 12 1984 | DISTRIBUTED. January 11, 1985 |
| Dec 17 1984 | Brief of respondents U.S. Trust Co. of NY, et al. in opposition filed. |
| Jan 15 1985 | Reply brief of petitioner Augustin J. San Filippo filed. |
| Jan 16 1985 | REDISTRIBUTED. February 15, 1985 |
| Jan 16 1985 | REDISTRIBUTED. February 15, 1985 |
| Feb 19 1985 | REDISTRIBUTED. February 22, 1985 |
| Feb 19 1985 | REDISTRIBUTED. February 22, 1985 |
| Feb 25 1985 | REDISTRIBUTED. March 1, 1985 |
| Feb 25 1985 | REDISTRIBUTED. March 1, 1985 |
| Mar 4 1985 | Petition DENIED. Dissenting opinion by Justice White. |

CONTINUE {

PROCEEDINGS AND ORDERS DATE: 030685

CASE NBR 84-1-00763 CFX
SHORT TITLE San Filippo, Augustin J. DOCKETED: Nov 9 1984
VERSUS U.S. Trust Co. of NY, et al.

| Date | Proceedings and Orders |
|---|---|
| Mar 4 1985 | Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.) Justice Powell OUT. |

**********

84-763



No.

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1984

---

AUGUSTIN J. SAN FILIPPO,
*Petitioner,*

v.

U.S. TRUST COMPANY OF NEW YORK, INC.,
J. GREGORY VAN SCHAACK and BRUCE DENNEN,
*Respondents.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

EUGENE GRESSMAN
School of Law
University of North Carolina
Chapel Hill, N.C. 27514
(919) 962-4120
*Counsel for Petitioner*

*November 9, 1984*

CASILLAS PRESS INC. - 1717 K ST NW WASHINGTON DC - 223-1230

61 RP

## QUESTIONS PRESENTED

1. Whether the federal courts of appeals have "pendent appellate jurisdiction" under 28 U.S.C. § 1291.

2. Does a federal court of appeals, having accepted jurisdiction to review a collateral final order embodied in a pretrial denial of summary judgment in a civil case, have "pendent appellate jurisdiction" under 28 U.S.C. § 1291 to review the otherwise nonfinal and nonappealable issues involved in the summary judgment denial?

3. Does the collateral order doctrine permit immediate appeal from a pretrial order denying a claim of absolute witness immunity that springs from the common law rather than any constitutional provision?

---

[Note: Petitioner reserves the right to argue Question 4 in the event certiorari is granted on all the above questions, but does not include Question 4 among the reasons for the grant of certiorari].

4. Does a court of appeals abuse its discretion in making an independent examination of the record to determine if a plaintiff, in making conclusory allegations of a conspiracy, has stated a cause of action under 42 U.S.C. § 1983, particularly where pretrial discovery as to the conspiracy has not been completed?

### PARTIES BELOW

The parties to the proceedings below were the petitioner Augustin J. San Filippo and the respondents U.S. Trust Co., J. Gregory Van Schaack and Bruce Dennen. The Honorable Robert M. Morgenthau, District Attorney for the County of New York, was a separate appellee in the court below on the sole issue respecting respondents' efforts to inspect the grand jury minutes; since that issue is not addressed in this petition, the District Attorney is not named as a party herein.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases:** **Page**

**Miscellaneous:**

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

---

No. 84-

---

AUGUSTIN J. SAN FILIPPO,

*Petitioner,*

v.

U.S. TRUST COMPANY OF NEW YORK, INC., J. GREGORY VAN SCHAACK and BRUCE DENNEN,

*Respondents.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

The petitioner Augustin J. San Filippo respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on June 14, 1984.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 737 F.2d 246, and is reprinted in the appendix hereto, p. 1a, *infra.*

The memorandum decision of the United States District Court for the Southern District of New York (Gagliardi, D.J.) has not been reported. It is reprinted in the appendix hereto, p. 26a, *infra.*

## JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983, the petitioner brought this suit in the Southern District of New York. On June 29, 1983, the Southern District denied the respondents' motions for summary judment and for other relief of an interlocutory nature. See p. 26a, *infra.*

On respondents' appeal, the Second Circuit on June 14, 1984, entered a judgment and an opinion reversing the Southern District's orders and directing that petitioner's complaint be dismissed for failure to state a valid claim for relief under § 1983. See p. 24a, *infra.* No petition for rehearing was sought.

On September 4, 1984, Justice Marshall ordered that the time for filing this petition for writ of certiorari be extended to and including November 10, 1984.

The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

*28 U.S.C. § 1291. Final decisions of district courts*

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of

Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

## STATEMENT OF THE CASE

Petitioner has been a practicing lawyer in New York City for 35 years. In 1981 he instituted this damage action, sounding in malicious prosecution, pursuant to 42 U.S.C. § 1983. The complaint alleged that, during the period from July 1977 to June 1978, the U.S. Trust Co. and two of its officers — the respondents herein — had acted in furtherance of an "agreement and conspiracy" with one Matthew Crosson — an Assistant District Attorney of New York County — to deprive petitioner of his civil and constitutional rights secured by the Fifth and Fourteenth Amendments.

The alleged "agreement and conspiracy" involved presentation of false, perjured and misleading testimony to investigating officers of the District Attorney's office and to a state grand jury by the two officers of U.S. Trust Co., as well as the withholding of exculpatory evidence from that jury. The purpose of such action was to bring about petitioner's indictment for grand larceny for his alleged role in helping two of his clients fraudulently procure two loans from the U.S. Trust Co. A two-count grand larceny indictment was in fact returned.

Upon his arrest, petitioner was held in custody for 22 hours before being admitted to bail. He was thereafter brought to trial. On July 12, 1979, after a short delibera-

tion, a jury found petitioner not guilty of the grand larceny charges. Despite the acquittal, petitioner suffered and continues to suffer grievious losses in his once thriving law practice, as well as losses to his professional and personal reputation.

The details of the alleged "agreement and conspiracy" with respect to the grand jury testimony have not been fully developed at the pretrial stage of this § 1983 action. Petitioner's efforts to depose the two bank officers, who possess most of the relevant facts, have been repeatedly resisted by the officers, the most recent tactic being to object to depositions on the claim that the officers as grand jury witnesses were absolutely immune from § 1983 liability and therefore from pretrial depositions. The District Court rejected that defense and ordered that depositions be taken within 20 days. See p. 35a, *infra*. This deposition order was to become one of the four nonfinal orders that respondents sought to take to the Second Circuit.

The present § 1983 controversy finds its origin in petitioner's representation of two clients, Dora Dodge Moran and her husband Daniel Moran. In January of 1977, when the Morans were seeking unsecured bank loans, petitioner accompanied the Morans and their business friend, one Joseph Cole, to the offices of the U.S. Trust Co. There they met with the two respondent bank officers. At that initial meeting, the officers agreed to extend the Morans an unsecured $55,000 loan, on the basis of Joseph Cole's personal guarantee. A subsequent $20,000 loan was also made.

In the course of securing these two loans, Mrs. Moran made a material misrepresentation that she was the beneficiary of a $9,000,000 trust, to be distributed to her within a year. There was no such trust. In addition, Mrs. Moran

made unauthorized changes in another instrument bearing authentic signatures to make it appear as one establishing such a trust, and conveyed the altered document to the bank, through the petitioner, a few days after the initial meeting. It was on the basis of this misrepresentation that the Morans and the petitioner were later indicted on grand larceny charges.

Mrs. Moran, in pleading guilty to the grand larceny charges, admitted that she alone had made the misrepresentation to the bank officers, and that she alone had altered the trust instrument. And she specifically stated that the petitioner was in no way responsible for or aware of the misrepresentation. Petitioner's non-involvement in the making of this misrepresentation was necessarily known by the bank officers, and would necessarily have been confirmed by any fair investigation of the matter by the District Attorney's office. But, under the theory of petitioner's § 1983 complaint, the very fact that petitioner was indicted for having made the representation is explainable only by the existence of an understanding between the bank officers and the District Attorney's office to paint a totally false picture to the grand jury concerning petitioner's involvement in making the misrepresentation. The District Attorney's involvement was apparently motivated by petitioner's refusal to cooperate with his office in another unrelated investigation.

After issue was joined, respondents were granted leave to amend their answer to include the defense of absolute witness immunity, which led to the refusal of the bank officers to appear for depositions. The respondents then moved to dismiss the complaint for failure to state a claim upon which relief can be granted (Rule 12(b)(6), Fed.R. Civ.P.), or in the alternative for summary judgment (Rule

56, Fed.R.Civ.P.). Since the parties relied on matters outside the pleadings, the District Court treated the motion as one for summary judgment. So treated, the motion for summary judgment for the respondents was denied. See p. 26a, *infra*.

Two aspects of the memorandum decision denying summary judgment require emphasis:

(1) In footnote 4 of the opinion, the District Court rejected the respondents' claim that they are immune from liability under 1983 because their communications with the District Attorney's staff, as well as their testimony before the grand and petit juries, entitled them to the absolute witness immunity recognized by this Court in *Briscoe* v. *LaHue*, 460 U.S. 325 (1983). The court could find no authority for extending that kind of immunity to statements and testimony by private citizens in the course of a conspiracy with prosecuting authorities to deprive one of federal rights. See p. 31a, *infra*.

(2) In the course of rejecting respondents' claim that they had not acted "under color of state law" so as to subject themselves to 1983 liability, the District Court stated (p. 30a, *infra*):

> Because on the record before the court, factual issues with regard to the existence of this conspiracy remain in dispute, defendants are not entitled to summary judgment on the basis of their argument that they did not act under color of state law.

In due course, the respondents took appeals to the Second Circuit from four concededly nonfinal orders of the District Court – particularly the order denying summary judgment and the order directing the individual respon-

dents to submit to depositions.[1] The respodents invoked the Second Circuit's jurisdiction under 28 U.S.C. § 1291 to review "final decisions" of district courts. At respondents' urging the Second Circuit found the requisite finality in an underlying collateral aspect of those two orders, *i.e.*, the District Court's rejection of the asserted absolute immunity defense. In the Second Circuit's words (pp. 16a-17a, *infra*):

> We conclude that both the denial of summary judgment and the order requiring defendants to be deposed are properly before this court under the "collateral final order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), at least insofar as the district court premised its decisions on a rejection of defendants' asserted absolute immunity defense. . . .
>
> The Supreme Court has held on several occasions that interlocutory orders denying claims of absolute immunity are appealable under *Cohen*.

The Second Circuit thereupon addressed the absolute immunity issue and, like the District Court, rejected the immunity claim on its merits. While finding that the claim was not frivolous, the court concluded that the absolute immunity of witnesses in judicial proceedings, *Briscoe* v. *LaHue*, 460 U.S. 325 (1983), does not extend "to cover

---

[1] Respondents also sought interlocutory review of two District Court orders denying disclosure and *in camera* inspection of the grand jury minutes. Petitioner took no position on those motions, which were vigorously opposed by the District Attorney's office. In the Second Circuit, the District Attorney's office argued that these discovery orders were nonfinal and did not fall within the "collateral final order" doctrine of *Cohen* v. *Beneficial Industrial Loan Co.*, 337 U.S. 541 (1949). Aside from noting that appeals had been taken from these orders, the Second Circuit did not discuss the challenge to its jurisdiction or the merits of the orders themselves.

extra-judicial conspiracies between witnesses and the prosecutor to give false testimony" (p. 19a, *infra*).

Having thus exercised jurisdiction over the collaterally final issue of absolute immunity, the Second Circuit proceeded to assert and exercise what it called its "pendent appellate jurisdiction" to review all other "otherwise nonappealable issues" raised by the respondents in the District Court in support of their summary judgment motion. Citing only Second Circuit precedents, the court explained (p. 19a, *infra*):

> However, defendants raised several additional grounds in the district court in support of their motion for 12(b)(6) dismissal or, in the alternative, summary judgment . . . . None of these alternative grounds would in its own right merit interlocutory review under *Cohen*. However, under the doctrine of pendent appellate jurisdiction, we may, in our discretion, consider otherwise nonappealable issues in the case as well, where "[t]here is sufficient overlap in the factors relevant to [the appealable and nonappealable] issues to warrant our exercising plenary authority over [the] appeal."

In view of what the court considered to be a sufficient overlap and because of the "waste of judicial resources were this suit to go forward" (p. 20a, *infra*), the Second Circuit found "every reason" to invoke its "pendent appellate jurisdiction" in this case.

The final portion of the Second Circuit's opinion is devoted to a review of one of the "otherwise nonappealable issues" in the case, an issue that has none of the characteristics of a collateral final order. That issue was whether petitioner had made sufficient allegations of con-

spiracy to state a valid claim for relief under § 1983 so as to survive either a Rule 12(b)6) motion for dismissal or a Rule 56 summary judgment motion in respondents' favor.

The Second Circuit acknowledged that the District Court had remarked that there were disputed factual issues as to the existence of a conspiracy. But without attempting to review the propriety of the lower court's statement, the Second Circuit launched into its own independent review of "the papers submitted by the parties on the summary judgment motion" and was "unable to find any genuine issue of fact raised with respect to the conspiracy allegation" (p. 20a, *infra*). And the Second Circuiut made no reference to the fact, obvious from the appeal from the deposition order, that the respondents' refusal to be deposed had made it impossible for petitioner to flesh out the conspiracy allegations.

From its review, the Second Circuit concluded that petitioner "at no point in the proceedings" had alleged "one shred of evidence in support of his conclusory assertion of conspiracy, beyond the fact that [the District Attorney's staff] met with defendants prior to their grand jury testimony" (p. 22a, *infra*). The mere allegation of such meetings, as to which "[w]e see nothing suspicious or improper" (*id.*), was said to be insufficient to create a material issue of fact. And the court opined that "it is imperative for courts to examine with great care any suit charging that prosecution witnesses conspired with the prosecutor, and to dismiss on pre-trial motion those that are clearly baseless," citing two of its own precedents. See p. 22a, *infra*.

The Second Circuit accordingly reversed "the denial of defendants' motion for dismissal, and remand]ed] to the district court with instructions to dismiss the complaint." See p. 22a, *infra*.

## REASONS FOR GRANTING THE WRIT

### I.

**The Second Circuit's "pendent appellate jurisdiction" doctrine (a) extends the "collateral finality" doctrine beyond the limits of 28 U.S.C. § 1291, and (b) conflicts with decisions of this Court and other Circuits.**

Without congressional authorization, the Second Circuit has manufactured a new branch of federal appellate jurisdiction, called "pendent appellate jurisdiction." By building upon the collateral order exception to the final judgment rule of 28 U.S.C. § 1291, the court has given itself discretionary jurisdiction to review "pendent" issues that are themselves nonfinal and thus nonappealable under § 1291. Such a drastic reordering of the finality rule deserves this Court's attention.

The Second Circuit's creation of such a "pendent" jurisdiction directly conflicts with this Court's ruling in *Abney* v. *United States*, 431 U.S. 651 (1977). While upholding § 1291 jurisdiction over a collateral final order denying a motion to dismiss an indictment on double jeopardy grounds, *Abney* held that an appellate court lacks jurisdiction — or what the Second Circuit calls "pendent appellate jurisdiction" — to pass upon "other claims presented to, and rejected by, the district court in passing on the accused's motion to dismiss." 431 U.S. at 663. The Court added, in words peculiarly relevant to the Second Circuit's assertion of jurisdiction to "consider otherwise nonappealable issues in the case as well" (p. 19a, *infra*),

> Rather, such claims are appealable if, and only if, they too fall within *Cohen*'s collateral-order exception to the final-judgment rule. Any other rule would encourage criminal defendants to

> seek review of, or assert, frivolous double jeopardy claims in order to bring more serious, but otherwise nonappealable questions to the attention of the courts of appeals prior to conviction and sentence. [431 U.S. at 663].

The conflict between *Abney* and the instant case could not be more complete. While *Abney* was a criminal case involving a double jeopardy kind of collateral order, in contrast to the civil nature of this case and a collateral order involving a claim of absolute witness immunity, those differences do not appear significant on the issue of the extent of appellate power under § 1291 to resolve "otherwise nonappealable questions."

Equally in conflict with the decision below is *Akerly* v. *Red Barn System, Inc.*, 551 F.2d 539, 542-543 (3rd Cir. 1977). There the Third Circuit accepted § 1291 jurisdiction over what it deemed to be a collateral order refusing to disqualify counsel, but held that it lacked jurisdiction to review the trial court's refusal to dismiss the complaint. See also *Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1209 (3rd Cir. 1979) (reviewing a collateral order denying summary judgment on an issue of absolute immunity, but refusing to review the denial of summary judgment on an issue of qualified immunity, relying on *Abney*).

The concept of "pendent appellate jurisdiction" also appears contrary to the finality rule embedded in § 1291 and to the limited nature of the collateral order exception established in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). Section 1291 on its face confers appellate jurisdiction only over "final decisions." It does not contemplate that courts will acquire, in addition, jurisdiction to review nonfinal decisions that are somehow thought to be appended to a reviewable final decision. Ap-

peals from interlocutory orders are governed by § 1292, not § 1291. As Professor Wright has noted, courts consistently use the *Cohen* collateral order exception "sparingly, lest an expanded 'collateral order' doctrine swallow the basic finality requirement [of § 1291] and the courts become swamped with appeals." C. Wright, *The Law of Federal Courts*, 703 (4th ed., 1983); see, *e.g.*, *Blackie* v. *Barrack*, 524 F.2d 891, 897 (9th Cir. 1975).

Indeed, one of the dangers of the Second Circuit's expansion of the *Cohen* exception is that it will open the floodgates of appeals from nonappealable orders. Litigants would be encouraged to make colorable if not frivolous "collaterally final" claims and then "bring more serious, but otherwise nonappealable questions to the attention of the courts of appeals," *Abney* v. *United States*, *supra*, in the course of appealing a *Cohen* collateral order.

The Second Circuit seeks justification for its "pendent appellate jurisdiction" in the thought that, where there is "sufficient overlap" in the factors relevant to the appealable and nonappealable issues,[2] it would be a "waste of judicial resources were this suit to go forward" (p. 20a, *infra*). That thought reflects at least three misunderstandings about the policy and purpose of § 1291 and the collateral order exception thereto:

---

[2]The court does not identify the nature or extent of the "overlap" in this case. Presumably it speaks of an overlap of the collateral "absolute witness immunity" defense with the issue as to the sufficiency of the allegations of conspiracy in the § 1983 complaint. The court holds that the mere allegation of a conspiracy is enough to destroy that defense, an issue that is said to be separate and independent from the sufficiency of the conspiracy allegations for purposes of stating a cause of action under § 1983.

(1) Consideration of collateral orders is founded not upon any "overlap" with the remainder of the case but rather upon the "separability" and "independence" of the collateral issue from the rest of the case. *Cohen,* 337 U.S. at 546.

(2) Judicial efficiency and prevention of "waste of judicial resources" are not the prime targets of § 1291 jurisdiction or the collateral order exception. Nor does § 1291 anticipate that, once a collateral order is properly before the appellate court, all potentially reversible interlocutory orders of a "pendent" nature will be reviewed so as to avoid unnecessary trials. See *Akerly v. Red Barn System, Inc., supra,* 551 F.2d at 543.

(3) The expressed concerns of the Second Circuit speak more of the concerns of § 1292(a)(1) jurisdiction to review interlocutory injunction orders. While appellate review under that section is normally limited to the issues relevant to the propriety of the interlocutory order itself, this Court has long recognized that review quite properly extends to all matters inextricably bound up with the remedial decision; if it sees fit, therefore, a court may consider and decide the merits of the case where there is an "overlap" between the merits and the injunction. See *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 287 (1940); *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U.S. 485, 495 (1900); *Smith* v. *Vulcan Iron Works,* 165 U.S. 518, 524-525 (1897).

Confirmation of the Court's confusion about § 1292(a)(1) jurisdictional concepts is found in the precedents cited in the opinion below (pp. 19a-20a, *infra*) for the exercise oif "pendent appellate jurisdiction." All those exercises were by the Second Circuit itself in the context of injunction or clas action cases. The phrase "pendent appellate jurisdiction" finds its origin in another Se-

cond Circuit case, *General Motors Corporation* v. *City of New York*, 501 F.2d 639, 648 (2d Cir. 1974), where the court refered to the "doctrine of pendent jurisdiction at the appellate level" and cited this Court's decision in *Deckert* v. *Independence Shares Corp., supra* (an interlocutory injunction case), and Professor Moore's discussion of the scope of review on appeal from an interlocutory order granting an injunction, 9 J. Moore, *Federal Practice*¶ 110.25[1] (2d ed. 1973). In short, the Second Circuit has coined a phrase to describe a long-standing practice with respect to appeals from interlocutory injunctions and transferred the phrase and the practice to appeals from collateral final orders under § 1291.[3]

The Second Circuit has thus created a confusing precedent, likely to generate even further confusion among the other Circuits. It is a precedent directly at odds with this Court's ruling in *Abney*. Plenary consideration of the matter by this Court is essential.

## II.

**The decision below that denial of a common law absolute immunity claim is an appealable collateral order raises important and unresolved problems.**

The Second Circuit has here held that both the denial of summary judgment and the order requiring respondents to

---

[3]The term "pendent jurisdiction" usually refers to the discretionary power of federal district courts to decide state law claims that arise out of the same nmucleus of operative fact from which springs a federal "arising under" claim — so as to permit the conclusion that the entire action before the federal court is but one Article III "case." *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966). Only the Second Circuit appears to have adapted the term to federal appellate jurisdiction.

be deposed were properly before the court under the "collateral final order" doctrine of *Cohen*, 337 U.S. at 546, at least insofar as those orders were premised "on a rejection of defendants' asserted absolute immunity defense" (p. 16a, *infra*). The asserted absolute immunity, of course, is the common law witness immunity, as described in *Briscoe* v. *LaHue*, 460 U.S. 325 (1983).

Thus is raised a significant question whether a pretrial denial of a common law immunity, absolute in nature, is immediately appealable as a *Cohen*-type collateral order. In giving an affirmative answer to that question, the Second Circuit relied upon three decisions of this Court giving collateral order status to three kinds of constitutionally-based absolute immunity denial orders. *Abney* v. *United States*, 431 U.S. 651, 659-662 (1977) (absolute immunity under the Double Jeopardy Clause); *Helstoski* v. *Meanor*, 442 U.S. 500, 506-508 (1979) (absolute immunity under the Speech or Debate Clause); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742, 750 (1982) (absolute immunity for President because of his "unique status under the Constitution"). As noted by Circuit Judge Sloviter, dissenting in *Forsyth* v. *Kleindienst*, 700 F.2d 104 at 107 (3d Cir. 1983), the "common thread" running through these collateral absolute immunity decisions is "a constitutional right, protected by an express constitutional provision."

But there is no decision by this Court holding that the denial of an absolute immunity claim, an immunity stemming from common law rather than from the Constitution, creates collateral finality. As the Court stated in *Nixon*, 457 U.S. at 755, the Court's decisions in the absolute immunity area have "recognized that the sphere of protected action must be related closely to the immunity's

justifying purpose" and that "an official's absolute immunity should extend only to acts in performance of particular functions of his office." And when collateral finality is ascribed to a denial of such an absolute claim, permitting an immediate appeal, the purpose is to prevent "insubstantial lawsuits" against public officials from coming to trial, lawsuits that "undermine the effectiveness of government as contemplated by our constitutional structure." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 819-820 n. 35 (1982).

Query, then, whether the denial of a common law based claim of absolute immunity – particularly when the claim is raised by private individuals defending against a private damage claim – implicates the policies and considerations justifying resort to the collateral order doctrine in the constitutional areas. Most lower courts, confronted with common law claims of absolute immunity, tend to ascribe collateral finality to the pretrial denial of such claims. See, *e.g.*, *Forsyth* v. *Kleindienst*, 729 F.2d 267, 271 (3rd Cir. 1984), certiorari granted Oct. 29, 1984, *sub nom. Mitchell* v. *Forsyth*, No. 84-335, but only on the related question whether the collateral order doctrine permits immediate appeal from an order denying a former Attorney General's claim of qualified immunity.

Lower courts need guidance from this Court as to the applicability of the *Cohen* collateral order doctrine to denials of absolute immunity claims arising out of the common law principles.

## CONCLUSION

For these various reasons, this petition for certiorari should be granted. Petitioner reiterates that Question 4 is presented herein, not as a reason for granting certiorari,

but because in the posture of this case this is the only opportunity for petitioner to seek review of the ultimate ruling of the Second Circuit that the petitioner's § 1983 complaint should be dismissed for failure to state a claim upon which relief can be given. If the petitioner is correct in urging that the Second Circuit had no "pendent appellate jurisdiction" to resolve that issue on the merits, the matter should be remanded to the District Court for appropriate disposition, after a full development of the facts concerning the conspiracy.

Respectfully submitted,

EUGENE GRESSMAN
School of Law
University of North Carolina
Chapel Hill, N.C. 27514
(919) 962-4120

*Counsel for Petitioner*

November 9, 1984

# APPENDIX A

## UNITED STATES COURT OF APPEALS
**For the Second Circuit**

---

No. 487, 488—August Term, 1983

Argued February 6, 1984 Decided June 14, 1984

Docket No. 82-7355, 82-3033

---

AUGUSTIN J. SAN FILIPPO,
*Plaintiff-Appellee,*

—against—

U.S. TRUST COMPANY OF NEW YORK, INC.,
J. GREGORY VAN SCHAACK and BRUCE P. DENNEN,
*Defendants-Appellants,*

HON. ROBERT M. MORGENTHAU, District Attorney
for the County of New York,
*Appellee.*

---

Before:

LUMBARD and VAN GRAAFEILAND,
*Circuit Judges.**

---

*At argument, the Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, recused himself. The parties then consented that the case be determined by Judges Lumbard and Van Graafeiland, as authorized by § 0.14(b) of the Rules of this Court.

In a § 1983 action charging conspiracy to deprive plaintiff Augustin San Filippo of his civil and constitutional rights by the presentation of false testimony to the grand jury, defendants U.S. Trust and two of its officers, Bruce P. Dennen and J. Gregory Van Schaack, appeal from two interlocutory orders, denying their motions for summary judgment and for disclosure of grand jury minutes, and ordering them to be deposed.

Reversed and remanded with instructions to dismiss the complaint.

---

ROGER P. MCTIERNAN, Esq., New York, N.Y. (Barry, McTiernan & Moose, New York, N.Y., Michael F. Close, Esq., of counsel), *for Defendants-Appellants.*

ALFRED S. JULIEN, Esq., New York, N.Y. (Julien, Schlesinger & Finz, P.C., New York, N.Y., David B. Turret, Esq., of counsel), *for Plaintiff-Appellee.*

RONALD G. BLUM, Assistant District Attorney for the County of New York (Robert M. Morgenthau, District Attorney for the County of New York, Mark Dwyer, Assistant District Attorney, of counsel), *for Appellee.*

---

LUMBARD, *Circuit Judge:*

Augustin San Filippo, invoking federal jurisdiction under 42 U.S.C. §1983, brought suit in the Southern District against United States Trust Company of New York, Inc. (U.S. Trust), and two of its officers, Jr. Gregory Van Schaack and Bruce P. Dennen, alleging that

they conspired with Matthew Crosson, an Assistant District Attorney (A.D.A.) of New York County, to deprive San Filippo of his civil and constitutional rights by falsely testifying to the grant jury concerning San Filippo's involvement in the fraudulent procurement of a $75,000 loan from U.S. Trust. Appellants Van Schaack and Denen seek review of two interlocutory orders of the district court, denying their motions for summary judgment and for disclosure of the grand jury minutes, and ordering them to be deposed.

Appellants' nonfrivolous claim of absolute immunity from prosecution makes the district court's denial of summary judgment appealable under the "collateral final order" doctrine of *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949). Although we decline to find absolute immunity here, as we assert jurisdiction because of this claim, we exercise our pendent appellate jurisdiction to review all other grounds raised by appellants below in support of summary judgment. We conclude that plaintiff's failure to allege any material facts to support his conclusory allegation of conspiracy warrants summary dismissal of his complaint under either Fed. R. Civ. P. 12(b)(6) or Fed. R. Civ. P. 56. We therefore remand to the district court and direct entry of judgment for the defendants.

This suit grows out of a 1979 New York County criminal prosecution of plaintiff-appellee Augustin San Filippo, attorney to Dora Dodge Moran and Daniel Moran, for aiding the Morans in procuring $75,000 in loans from U.S. Trust in 1977, on the strength of a forged instrument purporting to make Dora Moran the beneficiary of a $9 million trust. We summarize the salient facts leading up to that prosecution, which were recited in the statement of material facts submitted with defendants'

motion for summary judgment, and as to which plaintiff in his opposing papers raised no genuine issue. *See* Local Rule 3(g), Southern District of New York (facts stated by movant deemed admitted unless controverted by opposing party).

*The Dodge Estate.* In 1953, Dora Doge Moran, nee Dora Felstad, married Horace E. Dodge Jr., whose father and uncle had sold the Dodge automobile company in 1920 for $120 million. Horace E. Dodge Sr. died later that year, leaving to his widow Anna Thompson Dodge approximately $60 million invested in municipal bonds.

Before their marriage, Horace Jr. had agreed to leave Dora $1 million upon his death, which agreement was guaranteed by Anna Thompson Dodge. A son, John Francis Dodge, was born to Horace Jr. and Dora in 1954. Horace Jr. died in 1963, leaving Dora as his widow, and $12 million in debts and no assets.

In 1964, Dora sued Anna Thompson Dodge for the $1 million guaranteed in the prenuptial agreement and for $9 million for alienating the affection of Dora's deceased husband, who had begun divorce proceedings against Dora prior to his death. The suit was settled in April 1964 by the payment of $1,065,795 to Dora. Regarding Dora's later claims to be the beneficiary of a $9 million trust, no such trust ever existed, and Anna Thompson Dodge never set aside bonds or additional money for Dora in any other form.

Dora became Mrs. Dora Dodge Moran when she married her former bodyguard, Daniel Moran, in 1965. When Anna Thompson Dodge died in 1970 at age 106, Dora's son, John Francis Dodge, inherited about $5,600,000 under the will of his grandfather, Horace E. Dodge Sr. As John was a minor, his inheritance was placed in a custody

account, with Dora and Daniel Moran named as guardians.

*San Filippo's representation of the Morans.* Commencing in 1972, San Filippo represented Dora Dodge Moran in numerous financial transactions, including the purchase and sale of residences, investments in businesses, and the borrowing of money to sustain the lavish lifestyle of the Morans. In July of that year, San Filippo wrote to a business broker as attorney for the Morans, making the first of many representations that Dora Moran was the beneficiary of a large trust from Anna Thompson Dodge: "[T]he bulk of [the Morans'] assets in municipal bonds is in excess of $5,000,000, none of which are pledged or have liens on them, nor can they be due to the provision of a trust resulting from a settlement with Mrs. Dodge. Distribution of these assets is awaiting the final liquidation of the Dodge estate . . ." . None of this was true.

In April 1973, San Filippo made a similar claim in a letter to Manufacturers Hanover Trust Company about a loan for the Morans, enclosing a document representing them to be the owners of $5 million in municipal bonds, distribution of which was awaiting final disposition of the family estate. The list of bonds sent with the letter was almost identical to the list in the fraudulent trust agreement delivered to U.S. Trust on January 11, 1977.

In 1973 and 1974, San Filippo acted as counsel for the Morans in their acquisition of Dandor International, of which he became general counsel with an annual retainer of $25,000, and Walker Tool and Die, of which he became vice president. In January 1974, San Filippo attended a closing of Dora Moran's purchase of a Fifth Avenue apartment, and in July of that year he attended the closing of the Morans' purchase of property in Palm Beach, Florida, financed with $1,450,000 in mortage funds obtained

from the Teamsters' Local Pension Fund. In 1975, San Filippo also represented the Morans regarding their $15,000 indebtedness to American Express, for which judgment was entered against them.

Meanwhile, in March 1973, when Dora's son John turned 18, San Filippo arranged for the $3,900,000 then remaining in his custody account to be transferred to a spendthrift trust, of which San Filippo was desginated as a trustee with the Morans. At the same time, he also opened up a revolving loan account at a different bank in the name of the trust, with the trust assets pledged as collateral, and with himself, Dora Moran and Daniel Moran as signatories. From 1973 to 1976, sums in excess of $1.5 million were borrowed through the loan account. San Filippo denied negotiating those loans or signing off on the disbursements, most of which ultimately proved to be for the private benefit of Dora and Daniel Moran. However, he was aware that the outstanding loans frequently exceeded $1 million, and that as they came due, they were either rolled over into larger loans or repaid out of the son's trust funds.

In May of 1976, San Filippo was presented with an account statement for the trust fund, showing a balance of $193,750. According to the statement, of the $3.9 million principal in the fund when it was opened in 1973, about $1.5 million had gone to repay loans to the trust fund loan account, and the balance to repay various other loans, including $475,000 of the mortgage on the Morans' Palm Beach property obtained from the Teamsters' Local Pension Fund, creditors of the Morans, or directly to the Morans. At his trial, San Filippo acknowledged thinking it was "irregular" that the trust fund had been depleted to virtually nothing and that $1.5 million had apparently been disbursed from the trust fund loan account without

his required signature. He testified that he began investigation into those irregularities in the summer of 1976, and ultimately came to the belief that the Morans had breached their trust to Dora's son by using his trust fund for their own purposes – a belief confirmed by Dora's subsequent guilty plea in June 1977 to looting her son's acount while acting as his guardian and trustee.

Notwithstanding any suspicions San Filippo might have had by late 1976 concerning the Morans, he continued to represent them in their financial dealings. In December 1976, when he was contacted, at Dora's suggestion, by an officer of The Chase Manhattan Bank concerning an $11,000 overdraft by Dora, San Filippo confirmed that she was the beneficiary of a $9 million trust currently in probate, detailing the holdings of the trust to support that story. On January 3, 1977, San Filippo reconfirmed the existence of the $9 million trust fund to the officer from Chase and also assured the officer that U.S. Trust – whom he had yet to approach – was considering making the Morans a "substantial loan."

We come now to the representations made to U.S. Trust in January 1977, which formed the basis of San Filippo's criminal prosecution. On January 10, San Filippo called Van Schaack at U.S. Trust and told him that his clients, Dora and Daniel Moran, were interested in borrowing money from the bank. He informed Van Schaack that Dora was the beneficiary of a $9 million turst, and that she might possibly be interested in the depositing the proceeds with U.S. Trust when they became available. At a meeting later that day between Dennen, Van Schaack, San Filippo and the Morans, San Filippo reconfirmed the existence of the $9 million trust, and defendants requested to see a copy of the agreement. In reliance on San Filippo's and the Morans' representations concerning the trust, the possi-

bility of attracting the corpus of the $9 million trust, and the possibility (which never materialized) of a third party guaranty of the loan, U.S. Trust approved a $55,000 unsecured loan for the Morans that same day.

The following day, San Filippo delivered to Van Schaack a copy of the trust agreement which had been given to him by Dora Moran. The trust agreement ultimately turned out to be a forgery. At the same time, San Filippo suggested that U.S. Trust consider an additional loan of $450,000 to the Morans, to be secured by a surety bond. To that end, San Filippo presented a letter just received from a George Foundos in Chicago, indicating interest in providing a surety bond for that amount, upon receipt, *inter alia,* of documents and audits establishing the validity and value of the $9 million trust.

On January 12, in response to Foundos' request for verification of the trust, San Filippo sent Foundos a lengthy letter purporting to quote the pertinent sections of the trust agreement. San Filippo, however, had deleted the name of the bank (Detroit Bank and Trust Co., Detroit, Michigan) listed as trustee in one of the quoted provisions! San Filippo stated that based on his own examination of the agreement, which on its face appeared duly executed, and on the fact that "[he] knew from [his] own observations and as a result of [his] professional relationship with her that Mrs. Moran has been receiving the income from that trust since its creation and has been able to live luxuriously on that income with [three] expensive

---

[1] As the inclusion of that name would have enabled Foundos quickly to discover on his own that the trust agreement was a fraud, the government cited to San Filippo's deliberate exclusion of the name as evidence of his guilty intent.

homes . . . , all of which are staffed at all times,"[2] in his opinion the trust agreement was *bona fide*. In addition, San Filippo stated that "an attorney for the executor of the Anna Thompson Dodge will" had advised him in a telephone discussion – referring apparently to a December 1976 phone conversation set up by Dora Moran –[3] that distribution of Dora's $9 million had to await final probate of the estate, which would be not later than November 1977. Finally, he stated that:

> In order not to further complicate the administration of the Anna Thompson Dodge estate and create any problems that could postpone an expeditious termination of the probate proceedings

---

[2]As the trust never existed, San Filippo obviously could not have "known" from his own observations that Mrs. Moran was receiving the income from it. Furthermore, the state argued he could hardly have inferred it from their ability to sustain a lavish lifestyle, as he himself had helped them negotiate over a million dollars in loans from 1972 to 1977, and knew at least by May 1976 that a substantial part of the almost $4 million withdrawn from Dora's son's trust fund had gone to the Morans, all of which would have been adequate to explain their apparently ample means.

[3]According to San Filippo's testimony at his trial, in the middle of December, 1976, he asked Dora Moran why, given that Anna Thompson Dodge had died six years earlier, Dora had not yet received the money to which she was entitled under the purported trust agreement. Dora explained that no moneys could be released until probate of the estate was completed. To confirm that story, she placed a phone call to an unidentified party, and handed the phone over to San Filippo, saying "Here is one of the attorneys that is handling the estate. You talk to him and find out when this money will be released." The person on the phone identified himself to San Filippo as an attorney, and told San Filippo that probate of the Dodge estate would be completed by November 1977. San Filippo testified that the person, at San Filippo's request, sent a copy of the court order extending probate until that time to Dora Moran, who showed it to San Filippo. San Filippo stated at trial that he made no notes of the conversation, and he did not get the attorney's name.

> Mrs. Moran would prefer and has instructed that no direct inquiries be made with respect to the trust and the administration of the estate. An agreement has been made with all interested parties, i.e. the heirs, herself, trustees and the various attorneys involved, to that effect and Mrs. Moran intends to maintain that agreement at all costs.

San Filippo simultaneously sent a copy of the letter to Dennen at U.S. Trust.

Upon receipt of the letter, Foundos told San Filippo he thought it was "ridiculous" on its face, as San Filippo had failed to provide any outside audit of the trust agreement as requested. In response, San Filippo reiterated to Foundos that it wa a "secret trust," and that San Filippo's opinion vouching for its authenticity was as good as a court opinion. On January 17, 1977, Foundos notified Dora Moran and San Filipino that he would not pursue their application for a surety bond.

On January 20, 1977, Van Schaack contacted Philip Van Zile, the attorney for Anna Dodge since 1930 and one of the two co-executors and co-trustees of her estate. Van Zile told Schaack that he had never heard of the $9 million trust purportedly to go to Dora Moran. U.S. Trust never granted the $450,000 additional loan, but despite Van Zile's disclaimer, on February 4, 1977, Van Schaack approved an additional $20,000 loan to the Morans, purportedly to be used to buy out partners in a South American mining venture.[4]

---

[4]San Filippo subsequently argued that as Van Schaack was put on notice by his January 20 conversation with Van Zile that the trust agreement did not exist, he could not have relied on San Filippo's contrary prior representations in authorizing the February 4 loan of

From February through the fall of 1977, San Filippo continued to act as attorney to the Morans, travelling with them to Bogota, Colombia, and Europe in connection with their financial dealings, vouching for the authenticity of the trust to a potential lender in an opinion letter substantially identical to the letter sent to George Foundos,[5] and vouching for the trust verbally to an FBI agent, concluding with the statement that he had received the information from Mrs. Moran "and had checked it out and knew that it was factual."

*Indictment of the Morans and San Filippo.* In the early part of 1978, the District Attorney of New York County began an investigation of the Morans. By March or April, the D.A. had become aware that Dora Moran had represented to potential lenders (other than U.S. Trust) that she was the beneficiary of a $9 million trust. Investigators sent to Detroit by the D.A.'s office discovered that there was no such trust.

---

$20,000. Even if, as plaintiff argues, the absence of reliance means there was no probable cause for prosecuting San Filippo for fraud as to this second loan – a mater on which we express no opinion – it is irrelevant to the existence of probable cause with regard to the first loan of $55,000, which was authorized a week prior to Van Schaack's conversation with Van Zile.

[5]San Filippo made two changes in the letter, both of which the prosecution argued revealed guilty knowledge of the falsity of his representations in the January 12th letter to Fondos. In place of the January 12th statement that "I know from my own observations and as a result of my professional relationship with her that Mrs. Moran has been receiving that income from that trust . . . , he wrote on April 19th that "I have been advised that Mrs. Moran has been receiving substantial income presumably from this fund. . ." In place of the January 12th statement that: "In a telephone conversation had with an attorney for the executor of the Anna Thompson Dodge will, I was advised . . .", he wrote on April 19th: "In a telephone discussion with an attorney, who identified himself as the attorney for the executor of the Anna Thompson Dodge will. . . "

Meanwhile, in March 1978, the Morans filed for bankruptcy in the Southern District of Florida. When this came to the attention of the D.A.'s office, Matthew Grosson assigned Sergeant Woike to interview the list of creditors in the bankruptcy action. In May 1978, Woike contacted U.S. Trust, which was listed as being owed $79,000 (presumably the total of $75,000 in loans plus interest). U.S. Trust itself had made no prior move to contact the D.A.'s office or the New York City Police Department. In response to questioning by Woike, Van Schaack and Dennen stated that San Filippo had represented to them that Dora Moran was the beneficiary of a $9 million trust, partially in reliance on which U.S. Trust had approved $75,000 in loans. Woike reported that information to Crosson, and Crosson confirmed it directly in conversations with Van Schaack and Dennen prior to their grand jury testimony.

In May 1978, Crosson presented evidence to the grand jury against the Morans and San Filippo concerning, *inter alia,* fraudulent procurement of the U.S. Trust loans. Pursuant to a subpoena, Van Schaack and Dennen testified before the grand jury to the events surrounding the $75,000 loans, including San Filippo's alleged representations to them, and produced various documents from the U.S. Trust files. No evidence has been adduced at any point to sugest that Van Schaack, Dennen or U.S. Trust ever requested Crosson, to present evidence to the grand jury or to prosecute San Filippo.

In June 1978, the grand jury indicted San Filippo on two counts of larceny in the second degree, arising from the two loans secured by the Morans from U.S. Trust. It indicted Dora and Daniel Moran on one count of larceny by false pretences, arising from the two U.S. Trust loans, and one count of bilking Dora's son's trust fund of

$390,000 while acting as guardians of his account before he reached his majority. In an interview with San Filippo after his arrest, A.D.A. Crosson attempted to elicit San Filippo's cooperation in the government's case against the Morans, in particular with regard to the $1,450,000 in loans from the Teamster's Local Pension Fund. San Filippo denied any participation in the transactions, which Crosson knew from documentary evidence to be false, and discussions concerning San Filippo's possible cooperation were dropped.

In August 1978, Daniel Moran died of a gunshot wound, later ruled a suicide. In June 1979, Dora Moran pleaded guilty to both charges against her. On June 28, 1979, San Filippo's trial commenced in New York State Supreme Court. On July 12, after a day and a half of delibration, the jury acquitted him.

*San Filippo's civil suit.* In January 1981, San Filippo commenced this § 1983 action in the Southern District, charging that U.S. Trust, through its officers Van Schaack and Dennen, had deprived San Filippo of his civil and constitutional rights, including his right to be free from malicious prosecution, by conspiring with A.D.A. Crosson to present false testimony to, and withhold exculpatory evidence from, the grand jury concerning San Filippo's role in securing the Morans' U.S. Trust loan. Although the complaint specified the general nature of the false testimony and exculpatory evidence allegedly at issue, it contained no factual assertions to support the allegations of "agreement" or "conspiracy" between defendants and Crosson.

In their answer and amended answer, defendants asserted several affirmative defenses, including their absolute immunity from § 1983 liability for their grand jury testimony or prior discussions with the prosecutor.

After both sides exchanged preliminary discovery requests, defendants, with the support of plaintiff, moved below for orders unsealing the grand jury minutes. Judge Gagliardi referred all discovery matters to Magistrate Tyler, who, on January 13, 1982, ordered the grand jury minutes to be unsealed and disclosed to counsel. D.A. Robert Morgenthau appealed the disclosure order to Judge Gagliardi, who overruled it by order on April 12, 1982, on the ground that defendants had failed to show any particularized need for the minutes, as required by law. Defendants appealed that order and petitioned for mandamus to this court, arguing that the district court lacked jurisdiction under 28 U.S.C. § 636(b)(1)(A) to overrule Magistrate Tyler's order directing disclosure of the minutes.

While that appeal was still pending, defendants moved on July 7, 1982, before Magistrate Tyler for a protective order against being subject to further discovery, on the ground that *Harlow v. Fitzgerald*, 457 U.S. 800 (June 24, 1982), forbade discovery from proceeding until the threshold issue of an immunity defense had been resolved. Magistrate Tyler denied that motion and ordered Van Schaack and Dennen to be deposed within ten days or have their answer stricken. On July 30, 1982, defendants appealed that order to Judge Gagliardi, and simultaneously moved for dismissal under F.R.C.P. 12(b)(6) or, in the alternative, for summary judgment. In support of both motions, defendants asserted, in addition to their defense of absolute immunity, that malicious prosecution was not actionable under §1983; that plaintiff's conclusory allegations that defendants had conspired with A.D.A. Crosson were insufficient to meet the "under color of state law" requirement of § 1983; that plaintiff's multiple admitted false representations established probable cause for his prosecution as a matter of law; that plaintiff was col-

laterally estopped from challenging the sufficiency of the evidence to support the charges against him because he twice litigated that issue in his criminal trial and lost; and that plaintiff's action was time-barred.

In his opposition papers, plaintiff controverted none of the materials facts stated by defendants in support of their motion for summary judgment. His attorney, Bradford Cooke, submitted his own affirmation reiterating the facts plaintiff alleged to have been falsely given or wrongly withheld by defendants in the grand jury proceeding, most of which went to the question of whether U.S. Trust had relied on representations concerning the $9 million trust in approving the loan. In support of plaintiff's allegation of conspiracy, Cooke's affirmation stated only that:

> The deposition of Crosson . . . reveal[ed] the opportunity for the defendants and Crosson to conspire and agree to deprive plaintiff of a substantial liberty interest . . . .
>
> The opportunities were: the Woike-Van Schaack interview, the Cross [sic] – Van Schaack interview, the Woike-Dennen interview, and the Cross [sic] – Dennen interview.

On July 5, 1983, Judge Gagliardi denied summary judgment for defendants, affirmed Magistrate Tyler's deposition order, and denied defendants' further request that they be allowed *in camera* inspection of the grand jury minutes.

Defendants now seek interlocutory review of: (1) the April 12, 1982, order denying disclosure of the grand jury minutes for failure to show particularized need; and the July 5, 1983, order (2) denying *in camera* inspection of the grand jury minutes on the same ground, (3) denying summary judgment to defendants, and (4) affirming Magistrate Tyler's order requiring defendants to submit to depo-

sitions. Appellee D.A. Morgenthau opposes only the first two challenges, which seek disclosure of the sealed grand jury minutes. Appellee San Filippo, who supported defendants' request for disclosure of the grand jury testimony below, opposes only the third and fourth challenges, pertaining to summary judgment and depositions of defendants. Judge Gagliardia, agreeing that there was at least arguable jurisdiction over the appeal, granted defendants' motion to stay the deposition order pending this appeal.

II.

All four rulings that appellants here challenge are non-final orders within the meaning of 28 U.S.C. § 1291, and hence as a general rule are not reviewable prior to final judgment. *See Pacific Union Conference of Seventh-Day Adventists v. Marshall,* 434 U.S. 1305, 1306 (1977) (denial of summary judgment); *Xerox Corp. v. SCM Corp.,* 534 F.2d 1031, 1031-32 (2d Cir. 1976) (per curiam) (discovery orders); *see generally* 8 C. Wright & A. Miller, *Fed. Pract. & Proced.* § 2006 (1970); 10 C. Wright, A. Miller & N. Kane, *Fed. Pract. & Proced.* § 2715 (1976). Therefore, before reaching the merits of appellants' arguments, we address the threshold question of our jurisdiction to review any of those decisions on interlocutory appeal, under some exception to the finality requirement of § 1291.

We conclude that both the denial of summary judgment and the order requiring defendants to be deposed are properly before this court under the "collateral final order" doctrine of *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546 (1949), at least insofar as the district court premised its decisions on a rejection of defendants' asserted absolute immunity defense. *Cohen* provides that non-final orders may be appealed when they

conclusively resolve important and disputed questions that are completely separable from, and collateral to, the merits of the action, and are effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

The Supreme Court has held on several occasions that interlocutory orders denying claims of absolute immunity are appealable under *Cohen*. *See, e.g., Nixon v. Fitzgerald*, 457 U.S. 731, 742-43 (1982) (Presidential immunity); *Helstoski v. Meanor*, 442 U.S. 500, 506-08 (1979) (immunity under Speech and Debate Clause); *Abney v. United States*, 431 U.S. 651, 659-62 (1977) (immunity under Double Jeopardy Clause). The rationale for allowing interlocutory appeal in such cases is succinctly stated in *Briggs v. Goodwin*, 569 F.2d 10, 59 (D.C. Cir. 1977) (Wilkey, *J.*, writing separating for the court on appealability), *cert. denied*, 437 U.S. 904 (1978): absolute immunity is granted "as much to protect the relevant persons from a trial on their actions as it is to protect them from the outcome of trial," and the former protection will be lost if denial of the immunity defense cannot be appealed until final judgment.

Furthermore, it is settled under *Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108 (1983), that a witness has absolute immunity from § 1983 liability based on the substance of his trial testimony. Although the Court in *Briscoe* left the question open, *id.* at 1112 n.5, it must follow that grand jury witnesses should be similarly protected. *See Kincaid v. Eberle*, 712 F.2d 1023 (7th Cir. 1983); *cf. Dale v. Bartels*, 552 F. Supp. 1253, 1267-73 (S.D.N.Y. 1982) (finding such immunity pre-*Briscoe*). Thus, had plaintiff sued defendants on the basis of allegedly false grand jury testimony, and had Judge Gagliardi denied defendants' motion for summary judgment

on grounds of absolute immunity, that denial would be ripe for interlocutory review, and we believe reversal, under *Nixon* and *Briscoe*.

However, plaintiff has based his § 1983 claim not on defendants' testimony, but on their alleged *conspiracy* with the D.A.'s office to present false testimony and to withhold exculpatory evidence in the course of criminal proceedings. As Judge Gagliardi noted in rejecting defendants' immunity defense to that charge, no court has yet held that absolute immunity from prosecution for false testimony extends to conspiracy with public officials to present false testimony. However, the mere fact that the merits of defendants' claim to absolute immunity are unsettled does not of itself defeat their right to interlocutory review of that claim at this point. As the D.C. Circuit noted in *McSurely v. McClellan*, 521 F.2d 1024, 1032 (1975), in taking interlocutory review of a claim for immunity under the Speech and Debate Clause: "[T]he question of appealability does not turn on the correctness of an appellant's claim (at least so long as it is not frivolous). Rather, the issue is whether his right to appellate review of that claim — whether ultimately successful or not — will be effectively lost if jurisdiction is denied."

In the instant case, defendants have alleged substantial enough arguments in favor of extending immunity for false testimony itself to conspiracies to testify falsely, *see infra*, to defeat any suggestion that their claim of immunity is frivolous. Furthermore, in the event that claim did prevail, the argument made in *Briggs v. Goodwin, supra*, for the ineffectiveness of appeal from final judgment when immunity rights are abridged would apply with equal force here. Therefore, we conclude that defendants are entitled to interlocutory review of their immunity claim.

Having said that, we nonetheless reject the absolute immunity claim on its merits. *Briscoe v. LaHue, supra,* was expressly limited to immunity for testimony given in judicial proceedings, and its rationale — to encourage witnesses to come forward with all they know — does not justify extending that immunity to cover extra-judicial conspiracies between witnesses and the prosecutor to give false testimony. Nor do we find persuasive defendants' argument that absent the immunity they now seek, every witness could be intimated by the prospect of defending a civil suit charging 'conspiracy' to give false testimony, just as easily as a suit charging false testimony. Insofar as witnesses may face groundless 'conspiracy' suits, ample protection against costly defense should ordinarily be provided by the possibility of 12(b)(6) dismissal or summary judgment in defendants' favor.

As defendants' opposition to the deposition order was based solely on their claim of absolute immunity, our rejection of that claim disposes of defendants' challenge to that portion of Judge Gagliardi's order.

However, defendants raised several additional grounds in the district court in support of their motion for 12(b)(6) dismissal or, in the alternative, summary judgment. *See supra.* None of these alternative grounds would in its own right merit interlocutory review under *Cohen.* However, under the doctrine of pendent appellate jurisdiction, once we have taken jurisdiction over one issue in a case, we may, in our discretion, consider otherwise nonappealable issues in the case as well, where "[t]here is sufficient overlap in the factors relevant to [the appealable and nonappealable] issues to warrant our exercising plenary authority over [the] appeal." *Sanders v. Levy,* 558 F.2d 636, 643 (2d Cir. 1976), *aff'd en banc,* 558 F.2d 646, 647-48 (1977), *rev'd on other grounds sub nom. Op-*

*penheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978); *accord Marcera v. Chinlund*, 595 F.2d 1231, 1236-37 n.8 (2d Cir.), *vacated on other grounds sub nom. Lombard v. Marcera*, 442 U.S. 915 (1979); *see also San Filippo v. United Bro. of Carpenters & Joiners*, 525 F.2d 508, 512-13 (2d Cir. 1975) (motion to dismiss considered pendent to denial of preliminary injunction); *Horowitz v. Directors Guild of America, Inc.*, 364 F.2d 67, 70 (2d Cir. 1966) (same). We have invoked that discretionary power to consider issues presenting considerably less overlap than exists here, *see Holt v. The Continental Gruop, Inc.*, 708 F.2d 87, 92 n.4 (2d Cir. 1983) (denial of attorney disqualification motion considered as pendent to denial of preliminary injunction); *Green v. Wolf Corp.*, 406 F.2d 291, 302 (2d Cir. 1968); *cert. denied*, 395 U.S. 977 (1969) (order striking prayer for punitive damages considered as pendent to denial of class action). In view of that fact, and the waste of judicial resources were this suit to go forward, we see every reason to invoke that power in this case.

Reviewing the record with respect to defendants' motions for summary dismissal, we concluded that San Filippo's completely unsubstantiated allegations of conspiracy are insufficient to state a valid claim for relief under § 1983, or, in the alternative, to defeat defendants' motion for summary judgment.

In holding to the contrary, the district court stated only that "[b]ecause on the record before the court, factual issues with regard to the existence of [the alleged] conspiracy remain in dispute, defendants are not entitled to summary judgment on the basis of their argument that they did not act under color of state law." However, after reviewing the papers submitted by the parties on the summary judgment motion, we are unable to find any genuine

issue of fact raised with respect to the conspiracy allegation. The undisputed evidence shows that the sum total of defendants' involvement with San Filippo's prosecution is as follows. When questioned by Sergeant Woike, pursuant to a check of all creditors listed on the Morans' bankruptcy petition, defendants gave Woike their version of what had transpired in negotiations for the loan, including San Filippo's representations concerning the existence of the $9 million trust. They restated that information in a subsequent conversation with A.D.A. Crosson, initiated by Crosson, and so testified before the grand jury, pursuant to a subpoena from the government, at the same time providing documentary evidence subpoenaed by the state. There is no evidence whatsoever suggesting that defendants ever initiated any contact with the state concerning this case, or ever urged the state to prosecute San Filippo.

Even assuming some legitimate basis for charging that the defendants had given any false testimony – of which on this record we have no evidence whatever – San Filippo is precluded from bringing suit on that ground both because a private party giving testimony is not "acting under color of state law" for purposes of § 1983, *see Briscoe v. LaHue, supra,* 460 U.S. 325, 103 S.Ct. at 1113, and because all witnesses, whether private parties or government officials, have absolute immunity from damages liability for their testimony under *Briscoe.*

Undoubtedly mindful of both obstacles, plaintiff has based his claim instead on defendants' alleged *conspiracy* with A.D.A. Crosson and Sergeant Woike to present false testimony to the grand jury – a charge which, if substantiated, would supply the necessary state involvement for a § 1983 claim and avoid automatic dismissal under the *Briscoe* immunity defense. However, at no point in the

proceedings has plaintiff alleged one shred of evidence in support of his conclusory assertion of conspiracy, beyond the fact that A.D.A. Crosson and Detective Woike met with defendants prior to their grand jury testimony. We see nothing suspicious or improper in such meetings, which are routine and necessary in the preparation of evidence. If the mere allegation of their occurrence is sufficient to create a material issue of fact as to whether something improper took place during them, we agree with appellants that virtually every witness for the government could face the burden of defending a costly civil suit charging 'conspiracy' to give false testimony. Although we decline to recognize absolute immunity from suits alleging conspiracy on that ground, *see supra,* we think it is imperative for courts to examine with great care any suit charging that prosecutiion witnesses conspired with the prosecutor, and to dismiss on pre-trial motion those that are clearly baseless. *See Ellentuck v. Klein,* 570 F.2d 414, 426 (2d Cir. 1978); *Powell v. Workmen's Compensation Board,* 327 F.2d 131, 137 (2d Cir. 1964).

We therefore hold that plaintiff's conclusory allegations of conspiracy are insufficient to survive either a 12(b)(6) motion for dismissal, *see Slotnick v. Garfinkle,* 632 F.2d 163 (1st Cir. 1980); *Ellentuck v. Klein, supra; Ostrer v. Aronwald,* 567 F.2d 551 (2d Cir. 1977) (per curiam); *Grow v. Fisher,* 523 F.2d 875 (7th Cir. 1975), or in the alternative a motion for summary judgment in defendants' favor, *see Baxter v. Lewis,* 421 F.Supp. 504, 507 (W.D. Va. 1976); *cf.* Fed. R. Civ. P. 12(b) (Rule 12(b)(6) motion may be treated as motion for summary judgment if matters outside pleadings are considered). We therefore reverse the denial of defendants' motion for dismissal, and remand to the district court with instructions to dismiss the complaint.

As we are dismissing plaintiff's suit on this basis, we need not discuss the other arguments raised by defendants in support of summary dismissal and rejected by the district court.[6]

Reversed and remand with instructions to dismiss the complaint.

---

[6]However, we note that where, as here, a § 1983 claim is essentially for deprivation of civil rights through malicous prosecution, federal courts will generally look to the common law requirements to support a claim of malicious prosecution in judging the merits of the § 1983 claim. *See Singleton v. City of New York*, 632 F.2d 185, 195 (2d Cir. 1980); *Voytko v. Ramada Inn of Atlantic City*, 445 F. Supp. 315, 322-23 (D.N.J. 1978). In most states, absence of probable cause for the original charge is an essential element for a valid claim of malicous prosecution. *See, e.g., Broughton v. State*, 37 N.Y.2d 451, 457, 373 N.Y.S.2d 87, 94, *cert. denied sub nom. Schanbarger v. Kellogg*, 423 U.S. 929 (1975) (New York law); *Voytko v. Ramada Inn of Atlantic City, supra*, 445 F. Supp. at 322 (New Jersey law); *see generally* Restatement (Second) of Torts § 674 (1977).

In the instant case, we believe the substantial evidence implicating San Filippo in the Morans' fraudulent scheme establishes beyond doubt that there was probable cause for his prosecution. In addition to San Filippo's letter of January 12, 1977, to George Foundos purporting to know from personal observation that Dora Moran had been receiving income from the trust, we note that throughout the four years that San Filippo vouched for the existence of the trust, he never once sought to verify it with the attorneys for Anna Thompson Dodge, or with the bank and attorneys listed on the trust instrument — this, despite the long delay in probate, the fact that the purported value of the trust inexplicably grew from $5 million to $9 million over the four years, and the fact that Dora Moran enlisted his aid in an elaborate effort to prevent any prospective lenders from checking on the existence of the trust themselves.

# UNITED STATES COURT OF APPEALS
# FOR THE
# SECOND CIRCUIT

---

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of June, one thousand nine hundred and eighty-four.

Present:

HON. J. EDWARD LUMBARD
HON. ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges,

| | |
|---|---|
| AGUSTIN J. SAN FILIPPO,<br>Plaintiff-Appellee,<br><br>—against—<br><br>U.S. TRUST COMPANY OF NEW YORK, INC.<br>J. GREGORY VAN SCHAAK and BRUCE P. DENNEN,<br>Defendants-Appellants,<br><br>HON. ROBERT M. MORGENTHAU, District Attorney for the County of New York,<br>Appellee. | 82-7355,<br>82-3033 |

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Order of said Dis-

trict Court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

Elaine B. Goldsmith,
Clerk

/s/ Edward J. Guardaro
By Edward J. Guardaro
Deputy Clerk

## APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

AGUSTIN J. SAN FILIPPO,
Plaintiff,

81 Civ. 19

—against—

MEMORANDUM DECISION

UNITED STATES TRUST CO. OF NEW YORK INC., J. GREGORY VAN SCHAACK, BRUCE P. DENNEN,
Defendants.

----------x

GAGLIARDI, D.J.

Plaintiff Augustin San Filippo commenced this action under 42 U.S.C. § 1983 alleging that defendants United States Trust Company of New York, Inc. ("U.S. Trust") and its employees Gregory Van Schaak and Bruce P. Dennen conspired with New York County Assistant District Attorney Matthew Crosson to deprive plaintiff of his federal rights. Plaintiff claims that defendants provided false information to Crosson and to a Grand Jury of the Supreme Court of New York County and thereby fraudulently procured plaintiff's indictment and subsequent arrest. Defendants have moved pursuant to Rule 12(b)(6), Fed. R. Civ. P., to dismiss the complaint for failure to state a claim upon which relief can be granted and in the alternative for summary judgment pursuant to Rule 56, Fed. R. Civ. P. Because the parties have submitted and the court has considered matters not contained in the

pleadings, the court considers defendants' motion pursuant to Rule 56. *See Freeman v. Marine Midland Bank-New York,* 494 F.2d 1334, 1338 (2d Cir. 1974). Defendants also have moved for an order permitting an *in camera* inspection of the record of grand jury proceedings that led to plaintiff's indictment. Finally, defendants have appealed Magistrate Tyler's order dated June 20, 1982, which directed defendants Van Schaack and Dennen to submit to deposition by the plaintiff.[1]

**Background**

Beginning in the early 1970's, plaintiff served as an attorney for Dora Dodge Moran and her husband Daniel Moran. On January 10, 1977, plaintiff accompanied the Morans to U.S. Trust in order to introduce them to U.S. Trust officers Van Schaack and Dennen so that the Morans might obtain a loan. At that meeting, it was misrepresented to Van Schaack and Dennen that Dora Dodge Moran was the beneficiary of a nine million dollar trust which would be distributed to her within a year upon the completion of judicial proceedings concerning the estate of Anna Dodge, the mother of Dora Dodge Moran's first husband. Plaintiff contends that it was Dora Dodge Moran who made such misrepresentations and that he was

[1]Magistrate Tyler on July 28, 1982 orally denied a stay of his July 20 order that Dennen and Van Schaak be deposed. On July 29, 1982, this court denied a stay of the Magistrate's July 20 order. Plaintiff thereupon filed a motion pursuant to Rule 37, Fed. R. Civ. P., to impose sanctions upon defendants for the failure of Dennen and Van Schaak to submit to depositons. Shortly thereafter, the parties agreed to suspend discovery pending the resolution of defendants' summary judgment motion. In view of this agreement and of the court's resolution of defendants' appeal of the Magistrate's July 20 order, *see* p. 10 *supra,* plaintiff's motion for sanctions is denied without prejudice to plaintiff's right to renew this motion should defendants fail to comply with the discovery order contained herein.

not the source of any fraudulent information regarding the Morans' finances. U.S. Trust on the day of the meeting approved a six month unsecured loan for $55,000 to the Morans. On February 4, 1977, U.S. Trust approved a $20,000 increase in the amount of that loan.

On July 11, 1977, the loan in the total amount of $75,000 was called and the Morans defaulted. U.S. Trust thereafter learned that Dora Dodge Moran was not the beneficiary of a nine million dollar trust fund.

During May and June of 1978 Van Schaack and Dennen spoke with Matthew Crosson and other staff members of the Office of the New York County District Attorney. In June 1978, Van Schaak and Dennen testified before a Grand Jury of the Supreme Court of New York County, which subsequently indicted both Dora Dodge Moran and plaintiff for fraudulently having procured the loan from U.S. Trust. Plaintiff claims that he was indicted because defendants falsely represented to the grand jury that plaintiff had assured them that Dora Dodge Moran was the beneficiary of a nine million dollar trust. On June 22, 1978, plaintiff was arrested pursuant to the indictment. Plaintiff alleges that he remained in custody for a number of hours prior to being admitted to bail.

Plaintiff moved to dismiss the indictment prior to his trial and at the conclusion of the prosecution's case. Both motions were denied. On the second day of jury deliberations, July 12, 1979, plaintiff was acquitted. Plaintiff thereafter commenced this action, alleging that defendants' malicious prosecution deprived him of his federal rights including his Fourth Amendment right to be free from arrest without probable cause.

## Discussion

### I.

In order to prevail on their motion for summary judgement, defendants must demonstrate that there is no gennuine issue as to any material fact and that they are entitled to judgment as a matter of law. Rule 56(c), Fed. R. Civ. P. *see Schwabenbauer v. Board of Education*, 667 F.2d 305, 313 (2d Cir. 1981). Defendants claim that the undisputed facts in the record demonstrate, first, that defendants did not act "under color of state law" and that their conduct therefore is not subject to liability under section 1983. Even if they are found to have acted under color of state law, defendants argue that plaintiff has not shown any deprivation of federally protected rights but, at most, has set forth a state law claim of malicious prosecution not actionable under section 1983. Finally, defendants claim that even if conduct constituting malicious prosecution under state law may be subject to liability under section 1983, defendants' conduct did not constitute malicious prosecution in that defendants did not initiate the prosecution of plaintiff and had probable cause for accusing him of criminal conduct.[2]

---

[2]Defendants also argue that this action was untimely filed because the relevant statute of limitations is the one year limitations period applicable under New York law to malicous prosecution actions. It is true that the court in a section 1983 action must apply the most analogous state law statute of limitations. *See Board of Regents v. Tomanio*, 446 U.S. 478, 483-84 (1980). The Second Circuit has recognized, however, that for all claims asserted under section 1983 in New York State, the applicable statute of limitations is the three year period specified in section 214(2) of the New York Civil Practice Law and Rules which applies to state actions to recover upon a liability created by statute. *Pauk v. Board of Trustees of the City University of New York*, 654 F.2d 856, 861 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982). Defendants do not dispute that under this three year limitations period, plaintiff's complaint is timely.

With regard to defendants' claim that their conduct was not under color of state law, the court notes that a private individual who is a "willful participant in joint action with the state and its agents" may be subject to liability under section 1983. *Dennis v. Sparks*, 449 U.S. 24, 27 (1980). It is true that a private party does not become such a participant in governmental activity merely by proferring a criminal complaint or by testifying in a criminal proceeding. *See Grow v. Fisher*, 523 F.2d 875, 879 (7th Cir. 1975); *Warren v. Applebaum*, 526 F. Supp. 586, 587 (E.D.N.Y. 1981). Plaintiff here, however, has alleged that defendants conspired with the District Attorney's Office with regard to the commencement and prosecution of the criminal action against plaintiff. Such conspiracy with government officials, if proven, renders defendants' conduct state action within the meaning of section 1983. *See Dennis v. Sparks, supra*, 449 U.S. at 27-28; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1969). Because on the record before the court, factual issues with regard to the existence of this conspiracy remain in dispute, defendants are not entitled to summary judgment on the basis of their argument that they did not act under color of state law.[3]

Defendants next contend that the undisputed facts establish that plaintiff has not been deprived of any federal right and that defendants' conduct therefore is not actionable under section 1983. Although there is authority that malicious prosecution claims coupled with charges of false arrest are actionable only under state law, *see Cook v. Houston Post*, 616 F.2d 791 (5th Cir. 1980), the Second Circuit has suggested in dictum and this court has held

[3] The court's task of ascertaining the existence of genuine disputes as to material facts was made substantially more difficult by the references by both plaintiff and defendants to depositions and other evidentiary materials not contained in the record. Of course, the court has not relied on such references in deciding this motion.

that when an individual has been arrested without probable caues as part of a malicious prosecution in scheme, that individual has a cause of action under section 1983 against the party instigating the malicious prosecution. *See Singleton v. City of New York*, 532 F.2d 185, 194-95 (2d Cir. 1980); *Muller v. Wachtel*, 345 F. Supp. 160 (S.D.N.Y. 1972); *see also Voytko v. Ramada Inn*, 445 F.Supp. 315, 324 (D.N.J. 1978); *cf. Pyles v. Keane*, 418 F. Supp. 269, 276 (S.D.N.Y. 1976) (victim of malicious prosecution did not state cause of action under section 1983 because collateral estoppel barred his claim of arrest without probable cause). The court finds persuasive the reasoning of the decisions which hold that an individual arrested without probable cause has been deprived of a constitutional right and that a malicious prosecution effecting such a deprivation therefore is actionable under section 1983. *See Muller v. Wachtel, supra*, 345 F. Supp. at 162; *Voytko v. Ramada Inn, supra*, 445 F. Supp. at 324. Accordingly, the court rules that defendants are not entitled to summary judgment on the basis of their argument that, as a matter of law, plaintiff cannot prove that his federal rights were violated.[4]

---

[4]Defendants also argue that plaintiff may not recover from defendants for any violation of his federal rights because defendants' communications with the District Attorney's staff as well as their testimony before the grand and petit juries are immune from liability under section 1983. The Supreme Court has held that a witness has absolute immunity from section 1983 liability on the basis of his trial testimony, *see Briscoe v. Lahue*, 103 S.Ct. 1108 (1983) and there is authority that grand jury witnesses are similarly protected. *See Hahn v. Sargent*, 388 F. Supp. 445 (D. Mass.), *aff'd on other grounds*, 523 F.2d 461 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976). No court, however, has held that such immunity under section 1983 protects statements by a private citizen to prosecuting authorities in the course of a conspiracy with those authorities to deprive another of his federal rights. In the absence of any such authority, the court will not extend the protection of absolute immunity to defendants' statements to the New York County District Attorney's staff.

Finally, defendants argue that even if liability under section 1983 may attach in certain instances to conduct constituting malicious prosecution, plaintiff in this case cannot prove that he was a victim of malicious prosecution. Defendants claim that plaintiff cannot demonstrate two of the elements of the tort of malicious prosecution: defendants' initiation and control of the prosecution and lack of probable cause for the prosecution.

It is federal law which sets the contours for those civil wrongs which entail liability under 42 U.S.C. § 1983. *See Paul v. Davis,* 424 U.S. 693, 699-701 (1976). However, in determining whether an allegedly malicious prosecution violated federally protected rights, a federal court in section 1983 actions first must detemrine whether the challenge conduct constituted malicious prosecution under the common law of the state in which the court is located. *See Singleton v. City of New York, supra,* 532 F.2d at 195; *Voytko v. Ramada Inn, supra,* 445 F. Supp. at 322-24. The court concludes that in order to prove his claim under section 1983, plaintiff must demonstrate at a minimum that defendant's conduct reflected the following elements of the tort of malicious prosecution under New York law:

> (1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding, and (4) actual malice.

*Broughton v. State,* 37 N.Y.2d 451, 457, 373 N.Y.S.2d 87, 94, *cert. denied,* 423 U.S. 929 (1975).

With regard to the element of instigation of the criminal prosecution, plaintiff must demonstrate that defendants were responsible for the institution of the criminal action against plaintiff and did not merely report a crime truth-

fully and leave its prosecution in the hands of the authorities. *See Dempsey v. Masto*, 83 A.D.2d 725, 442 N.Y.S.2d 627 (3d Dep't 1981), *aff'd* 56 N.Y.2d 665, 451 N.Y.S.2d 731 (1982). Dennen and Van Schaak stated in affidavits that they did not contact government officials regarding plaintiff but rather simply reported their allegations of a crime in response to inquiries from the District Attorney's Office. Plaintiff, however, has suggested a number of bases for impeaching the credibility of these statements by defendants. The disputed credibility of the evidence that defendants did not initiate criminal proceedings precludes summary judgment on that basis. *See Colby v. Klune*, 178 F.2d 872 (2d Cir. 1950); *Society of New York Hospital v. Associated Hospital Service of New York*, 367 F. Supp. 149 (S.D.N.Y. 1973).

Defendants also claim that the record establishes that they had probable cause for accusing plaintiff of criminal conduct. Defendants argue first that plaintiff is collaterally estopped from denying the existence of probable cause since the state court denied motions to dismiss the indictment made before trial pursuant to section 210.30 of the New York Criminal Procedure Law and at the close of the prosecution's case pursuant to section 290.10 of the New York Criminal Procedure Law.[5]

It is true that the doctrine of collateral estoppel has been applied to prevent a plaintiff in a section 1983 action from relitigating issues that were decided against him after full and fair litigation of those issues in a state court pro-

---

[5]There is a presumption in malicous prosecution actions that an indictment is prima facie proof of the existence of probable cause. *See Trottier v. West*, 54 A.D.2d 1025, 388 N.Y.2d 180 (3d Dep't 1976). This presumption may be overcome by a showing that the indictment was procured by fraud or perjury. *Id.* Because there is a factual dispute as to whether the indictment at issue here was so procured, that presumption is not applicable to the instant motion.

ceeding. *See Allen v. McCurry*, 449 U.S. 90 (1980); *Winters v. Lavine*, 574 F.2d 46, 56-59 (2d Cir. 1978). In the instant case, however, the state court rulings relied upon by defendants did not resolve the issue of whether probable cause existed for the criminal prosecution of plaintiff. Rather, those decisions determined that the evidence before the grand jury and at trial was legally sufficient to support the indictment. *See* N.Y. Crim. Proc. L. §§ 210.20 and 290.10. The New York Court of Appeals has held that evidence may be legally sufficient to sustain an indictment even if it does not provide probable cause to believe that the defendant has committed the crime charged. *See People v. Warner-Lambert Co.*, 51 N.Y. 295, 298-99, 434 N.Y.S.2d 159, 160 (1980), *cert. denied*, 450 U.S. 1031 (1981).* Consequently, the refusal of the state court to dismiss the indictment against plaintiff was not necessarily a finding of probable cause for plaintiff's prosecution. Plaintiff therefore is not collaterally estopped from asserting that defendants lacked probable cause for their alleged attempt to procure his prosecution.

Defendants also argue that independent of any state court determinations regarding the indictment, this court must conclude that the undisputed facts in the record demonstrate that defendants had probable cause for accusing plaintiff of criminal conduct. The court finds that there are disputed facts material to this determination and that defendants' motion for summary judgment consequently must be denied.

---

*Although the Court of Appeals in *People v. Warner-Lambert* users the term "reasonable cause," this term plainly has the same meaning as the "probable cause" which bars an action for malicious prosecution. *Compare* N.Y. Crim. P. Law § 70.10(2) *with Williams v. City of New York*, 508 F.2d 356, 359-60 (2d Cir. 1974).

II.

With regard to defendants' motion for an *in camera* inspection of the minutes of the grand jury proceedings, the court finds that defendantts have failed to show that such inspection is necessary or appropriate for the resolution of the matters now pending before the court. Accordingly, defendants' motion for an *in camera* inspection is denied.

III.

With regard to plaintiff's appeal of Magistrate Tyler's order requiring Van Schaak and Dennen to submit to depositions, the court affirms that order as neither clearly erroneous nor contrary to law. *See* 28 U.S.C. § 636(b)(1)(A). Van Schaak and Dennen are directed to submit to deposition within 20 days of the date of this decision.

**Conclusion**

For the foregoing reasons, defendants' motion for summary judgment is denied. Defendants' motions for *in camera* inspection of the record of grand jury proceedings and for reconsideration of the magistrate's order are denied. Finally, plaintiff's Rule 37 motion is denied. *See* note 1, *supra*.

So Ordered.

Lee P. Gagliardi
U.S.D.J.

Dated: New York, New York
June 29, 1983.

(3)



No. 84-763

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

AUGUSTIN J. SAN FILIPPO, ESQ.,

*Petitioner,*

vs.

UNITED STATES TRUST COMPANY OF NEW YORK, J. GREGORY VAN SCHAACK and BRUCE P. DENNEN,

*Respondents.*

## BRIEF IN OPPOSITION TO CERTIORARI

New York, New York
13 December 1984

BARRY, MCTIERNAN & MOORE
*Attorneys for United States Trust Company of New York J. Gregory Van Schaack and Bruce P. Dennen*
115 Broadway
New York, New York 10006
(212) 964-4270

MICHAEL F. CLOSE
*Counsel for Respondents*

## TABLE OF CONTENTS



Pursuant to Rule 28.1, United States Trust Company of New York states: It is a wholly-owned subsidiary of U.S.Trust Corporation and affiliated with U.S.Trust Company of Florida; UST Advisory Company, Inc.; United States Trust Company International Corporation; United States Trust Company of New York (Grand Cayman), Ltd.; United States Trust Company of New York, Ltd.; Financiere UST, S.A.

## TABLE OF AUTHORITIES

No. 84-763

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

AUGUSTIN J. SAN FILIPPO, ESQ.,

*Petitioner*,

vs.

UNITED STATES TRUST COMPANY OF NEW YORK, J. GREGORY VAN SCHAACK and BRUCE P. DENNEN,

*Respondents*.

## BRIEF IN OPPOSITION TO CERTIORARI

### Petitioner's Falsifications of the Record

In the face of the Second Circuit's finding that there was "no evidence whatever" "for charging that the defendants had given any false testimony", 21a, and that the "substantial evidence implicating San Filippo in the Morans' fraudulent scheme establishes *beyond doubt* that there was probable cause for his prosecution" 23a n.6 (emphasis supplied), San Filippo brings to this Court an issue he never raised below although fully apprised of it by respondents' opening brief in the Second Circuit. Proving that "many self-perceived victims of defamation are animated by something more than a rational calculus of their chances of recovery", *Herbert v. Lando*, 441 U.S. 153, 204

(1979) (Marshall, J., dissenting), San Filippo has so egregiously misrepresented the record that his petition can only be described as a deliberate falsification. Respondents rely on the Second Circuit's statement of what were the *uncontested* facts before the district court and will simply correct the errors of the petition.

On 5 January 1981, after the New York limitations period under N.Y.C.P.L.R. §215(3) of one year for malicious prosecution had expired, plaintiff-petitioner filed this §1983 malicious prosecution action in the Southern District of New York, alleging in substance that respondents/cross petitioners[1] "conspired"[2] with an assistant district attorney for New York County, one Matthew Crosson, to present false evidence to, and withhold exculpatory evidence from, the grand jury which indicted San Filippo for grand larceny in July 1978. Contrary to San Filippo's petition at 5 in which he now attributes the District Attorney's "conspiracy" motive to San Filippo's refusal to cooperate in a pending investigation, the record is undisputed, indeed, petitioner's own brief below at 23 admitted, that San Filippo's meeting with the District Attorney occurred *after* his indictment, as the Second Circuit noted (13a), so the petitioner's argument that "[t]he District Attorney's involvement [in presenting false evidence to the grand jury] was apparently motivated by petitioner's refusal to cooperate with his office in another related investigation" is frivolous.

---

[1] Respondents are filing herewith a conditional cross petition under this Court's Rule 19.5.

[2] Nothing in the complaint or the record below sets forth the basis of the "conspiracy" between cross petitioners and Crosson or indeed states any joint objective except a desire "to obtain information" complaint at ¶¶ 6, 21, 32, about San Filippo's clients and confederates, the Morans, and no reason has ever been proposed why either respondents or the District Attorney needed or desired any such information. Indeed, the petition in this Court at 3 alleges that respondents presented false evidence *to the investigating officers of the District Attorney's office* and petitioners' brief to the Second Circuit at 7, 21 similarly alleged that defendants had lied to the District Attorney. If this were so, then there is no "conspiracy" with the DA, since a "conspiracy" presupposes that the DA knew the truth and chose to present a lie, not that respondents, as San Filippo continues to allege, misled the DA.

Incredibly, San Filippo unashamedly asserts in this Court that "[his] non-involvement in the making of this misrepresentation [i.e., about the bogus $9,000,000 trust] was necessarily known by the bank officers[3] and would necessarily have been confirmed by any fair investigation of the matter by the District Attorney's office." In fact the undisputed record shows the following:

That San Filippo's attorney in his criminal trial on his opening statement *admitted* that San Filippo had made the $9,000,000 trust representations to the defendants (San Filippo's defense being that he did not know the representation was false).[4] San

---

[3] Petitioner's statement that "efforts to depose the two bank officers . . . have been repeatedly resisted by the officers, the most recent tactic being [to claim absolute immunity]" is a complete misrepresentation of the record. In fact, Van Schaack and Dennen had appeared for their depositions, which *plaintiff's* counsel adjourned by agreement because he had been unable to provide the agreed upon specifications of exactly what grand jury testimony was perjured. Thirteen days after the opinion issued in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the defendants moved below under F.R.Civ.P. 26(c) to stay all discovery, which included depositions of both plaintiff and defendants, on the grounds that *Harlow* mandated a stay of discovery pending determination of an immunity defense. Although this motion was denied, plaintiff later stipulated to such a *Harlow* stay pending determination of summary dismissal rather than face defendants' appeal on the *Harlow* issue; *see* Judge Gagliardi's opinion at 27a, n.1. Plaintiff's stipulation also stayed his own deposition as well as defendants' discovery motion pending below testing (i) plaintiff's claims of attorney-client privilege with respect to the Morans; (ii) plaintiff's claims of attorney-client and work-product privileges with respect to testimony sought by defendants from his criminal attorney; and (iii) defendants' complaints about the sufficiency of plaintiff's interrogatory and document responses. Since plaintiff was as much the beneficiary of his stipulation as the defendants, this record is clearly why "[t]he Second Circuit made no reference to the fact . . . that the respondents' refusal to be deposed had made it impossible for petitioners to flesh out the conspiracy allegations" petition at 9. By the time briefs were filed in the Second Circuit, there was no live controversy regarding the deposition orders because the district court had stayed all proceedings pending resolution of the appeal.

[4] So she wants a loan, and he says: Well, I can call up the United States Trust, and I'll ask them if they are interested.

Well, you can imagine. He calls Mr. Van Schaack and he says: My client, *(cont. next page)*

Filippo's own trial testimony *admitted* he orally made the representation that there was a $9,000,000 trust".[5]

---

[4] *(footnote cont.)* Dora Dodge Moran, is interested in borrowing some money from your bank.

Well, it wasn't one of these things, I don't think we'll be interested. *He then tells them, because they are a trust company, he then tells them that she is the beneficiary of a trust, and they say, right away, either in that conversation or later, that they would like to get that nine million dollar trust in their bank. That would be a large piece of business for them.*

***

So he takes them down and they sit down with Mr. Van Schaack and a Mr. Bruce Dennen, who is his supervisor, who is there because of two things:

#1. Mr. Van Schaack only has authority to loan up to fifty thousand dollars and

#2. *Mr. Dennen is interested in this potentially large client for the bank.*

***

Fahringer's opening to the jury, E91-E93 (Emphasis supplied).

[5] Q Mr. San Filippo, let me ask you this: how did the discussion of the trust fund come up at that meeting?

A Well, while they were looking over the financial statement which has been now marked Defendant's Exhibit "O" they saw the $9,105,000 in Municipal Bonds. And, they asked about these bonds and where were they and what they consist of and so on.

Q Who asnwered those questions?

A Mrs. Moran said that these were bonds that were due to her from the Anna Dodge estate as a result of an agreement she had made with the Anna Dodge when her husband, Horace, died

Q *Did you incidentally or did you from time to time did you speak of the trust also?*

A *I mentioned that there was a trust agreement to that affect; yes.*

Q Now in terms of the trust, tell us as best you can recall what the conversation was between Mrs. Moran and either Mr. Dennen or Mr. Van Schaack concerning the trust fund?

A *They became very interested in having Mrs. Moran buy* (sic) *the trust corpus once she received it to their bank* and she (sic) had some kind of a soft sell about how they handle the very wealthy people and they can establish

*(cont. next page)*

San Filippo's "involvement" in the bogus $9,000,000 trust scheme consisted of elaborate representations he made in writing to U.S. trust, Manufacturers' Hanover, Chase Manhattan, Barnett Bank of Florida over the course of four years, as detailed in the Second Circuit's opinion 5a; 8a-11a, 23a n.6.

After hounding the defendants for four years, San Filippo, who has possessed the defendants' grand jury testimony since June 1979 is still unable to specifically state what the grand jury perjury was and quote the perjured testimony verbatim. There is no reason this Court should take the extraordinary step of deciding in the first instance an issue never raised below.

## REASONS FOR NOT GRANTING THE WRIT

### I

### THIS COURT HAS ALREADY APPROVED PENDENT APPELLATE JURISDICTION ON A CIVIL CASE

Petitioner argues that a criminal case, *Abney v. United States*, 431 U.S. 651 (1977) ("*Abney*") precludes the exercise of pendent appellate jurisdiction once jurisdiction is assumed over a collateral final order. The Second Circuit, which cited *Abney* in the same opinion and which has followed *Abney* in criminal cases, *e.g.*, *United States v. Klein*, 582 F.2d 186, 196 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979), never addressed this issue because petitioner never raised it, despite the fact that the pendent appellate jurisdiction issue was briefed in defendants' opening brief in the Second Circuit.

Petitioner's argument ignores a direct contrary holding. In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) ("*Eisen*"), this Court specifically upheld an exercise of appellate jurisdiction pendent to a collateral final order appeal under §1291, where the pendent matter was closely related to the §1291 appeal taken under *Cohn v. Beneficial Industrial Loan Corp.*, 337

---

[5] *(footnote cont.)* a good portfolio and we'll be very happy to handle your business. It was along those lines.

San Filippo's trial testimony at E967-E968 (emphasis supplied).

U.S. 541 (1949) ("*Cohen*" or "*Cohen* appeal"). In *Eisen* the collateral final order was the requirement by the district court that defendants be assessed 90% of the cost of notice to the plaintiff class. The Court ruled that the order requiring defendant to post the cost was reviewable under *Cohen* and because the Appeals Court had *Cohen* jurisdiction, it could go on to review all aspects of the district court's class action notice order, because they were closely related.[6]

*Abney* is distinguishable from *Eisen* on two grounds:

First, *Abney* was a criminal case. The restrictions on appeal have particular force in criminal prosecutions because "encouragement of delay is fatal to the vindication of the criminal law." *United States v. MacDonald*, 435 U.S. 850, 854 (1978) (quotation omitted). *MacDonald*, reviewing the collateral final order doctrine in a criminal appeal, emphasized "the importance of the jurisdictional question to the criminal law" 435 U.S. 850, 853 demonstrating that the *Abney/MacDonald* rule is confined to criminal cases.

Secondly, *Abney* apparently envisioned that *all* claims of double jeopardy would be immediately reviewable.[7] In contrast,

---

[6] Analysis of the instant case reveals that the District Court's order imposing 90% of the notice costs on respondents likewise falls within "that small class." It conclusively rejected respondents' contention that they could not lawfully be required to bear the expense of notice to the members of petitioner's proposed class. Moreover, it involved a collateral matter unrelated to the merits of petitioner's claims. Like the order in *Cohen*, the District Court's judgment on the allocation of notice costs was "a final disposition of a claimed rights which is not an ingredient of the cause of action and does not require consideration with it," *id.*, at 546-547, and it was similarly appealable as a "final decision" under §1291. In our view the Court of Appeals therefore had jurisdiction to review fully the District Court's resolution of the class action notice problems in this case, for that court's allocation of 90% of the notice costs to respondents was but one aspect of its effort to construe the requirements of Rule 23(c)(2) in a way that would permit petitioner's suit to proceed as a class action. (Footnote omitted).

*Eisen, supra*, 417 U.S. 156, 172.

[7] Admittedly, our holding may encourage some defendants to engage in dilatory appeals as the Solicitor General fears. However, we believe that such *(cont. next page)*

a *Cohen* order in a civil case must present a "serious and unsettled question" as a threshold matter or as the Second Circuit put it "substantial enough arguments" need be presented to support appealability. *E.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731, 742-43 (1982) (Presidential immunity was both serious and unsettled for jurisdictional purposes); *see Williams v. Collins*, 728 F.2d 721, 724-25 (5th Cir. 1984); *Weight Watchers v. Weight Watchers Int'l., Inc.*, 455 F.2d 770, 773 (2d Cir. 1972).

This Court has exercised pendent appellate jurisdiction in other contexts.[8] *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) is a good example. Harlow's appeal was accepted on the basis of absolute immunity. *See* 457 U.S. at 806 n.11. While rejecting the absolute immunity claim on its merits, the Court went on to determine the scope of qualified immunity, not itself the jurisdictional basis of the appeal, and the Court declined on prudential, not jurisdictional, grounds to dismiss the pleading for failure to state a claim. 457 U.S. at 820 n.36. Just as in the case below, the qualified immunity issue clearly presented "sufficient overlap" with the absolute immunity to justify reviewing both together. As the Court itself noted, however, in *Nixon*, unless these issues were properly "in" the Court of Appeals, it had no jurisdiction under 28 U.S.C. §1254(1). 457 U.S. at 741-42. As a learned treatise noted of the *Abney* decision:

> Although the Court's opinion does not consider the possibility, it should not be read to preclude considerations of some collateral rulings where special

---

[7] *(footnote cont.)* problems of delay can be obviated by rules or policies giving such appeals expedited treatment. It is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims of former jeopardy.

*Abney*, 431 U.S. 651, 662 N. 8.

[8] *See Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, ____ (1983) (approving pendent jurisdiction over "all matters on which the validity of the final order is contingent"); *Chadha* has subsequently been cited to support a narrow rule of pendent jurisdiction in immigration appeals. *E.g.*, *Mohammadi-Motlagh v. INS 727 F.2d 1450, 1452 (9th Cir. 1984).*

> circumstances suggest that this course would be desirable, and that there has been no attempt to abuse the collateral order appeal opportunity.
>
> Wright, Miller, Cooper & Gressman, Federal Practice & Procedure, Volume 16 §937 (Supp. 1983 at 119).

The Courts of Appeals have therefore exercised appellate jurisdiction pendent to a *Cohen* appeal under §1291 when it would be an "appropriate" exercise of jurisdiction and "would assist judicial economy", *Allied Paper Inc. v. United Gas Pipe Line Co.*, 561 F.2d 821, 825 (T.E.C.A. 1977) (*Cohen* jurisdiction over stay order gave pendent jurisdiction over cross appeal). *Metlin v. Palastra*, 729 F.2d 353, 355 (5th Cir. 1984), is a good example. Determining to "exercise pendent jurisdiction", 729 F.2d at 354, the 5th Circuit accepted an appeal from the denial of absolute immunity and reversed on the basis of qualified immunity: a ground it recognized as not separately appealable. 729 F.2d at 355. Like the Second Circuit below, the Fifth Circuit recognized that dispositive issue "requires only a routine application of settled principles"[9] 729 F.2d at 355. *Accord*, *Florida Farmworkers Council, Inc. v. Marshall*, 710 F.2d 721, 726-27 (11th Cir. 1983) (exercising "ancillary" jurisdiction); *Vickers v. Trainor*, 546 F.2d 739, 747 (7th Cir. 1976) (§1291 appeal justified review of otherwise non appealable class certification).[10] *See England v. Rockefeller*, 739 F.2d 140, 143 (4th Cir. 1984) (recognizing the power but declining to exercise it), cert.

---

[9] It is well settled that a mere conclusory allegation of "conspiracy" fails to state a claim which can survive a 12(b)(6) motion, as the Second Circuit noted at 22a.

[10] There is, however, an apparent conflict in the circuits. *Contra, United States v. Yellow Freight System, Inc.*, 637 F.2d 1248, 1251 & n.2 (9th Cir. 1981), *Forsyth v. Kleindienst*, 599 F.2d 1203, 1209 (3d Cir. 1979), *Akerly v. Red Barr System*, 551 F.2d 539, 543 (3d Cir. 1977) (refusing pendent jurisdiction). However, only the Third Circuit has applied *Abney* to a civil case, and none of these courts considered either *Eisen* or *Harlow*.

Petitioner is correct to note that pendent appellate jurisdiction as exercised below or in *Eisen*, *supra* has important parallels where the court undertakes a discretionary review of the sufficiency of the complaint on review of the grant or denial of a preliminary injunction, citing, *e.g.*, *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287 (1940). He makes no persuasive case, however, why the exercise of pendent appellate jurisdiction, itself a matter of discretion, should be construed in opposite ways depending upon how appellate jurisdiction is originally acquired. §1292(a)(1) appeals were authorized because of a "need to permit litigants to effectively challenge interlocutory orders of serious, perhaps irreparable, consequence," *Baltimore Contractors v. Bodinger*, 348 U.S. 176, 181 (1955), but this is a restatement of Justice Jackson's *Cohen* Formulation: "When [a final judgment is reached] it will be too late effectively to review the present order, and the rights conferred by the Statute, if applicable, will have been lost, probably irreparably." *Cohen*, 337 U.S. at 546. Thus in either case the policy rationale of §1292(a)(1) or of *Cohen* is very much the same. True it is that §1291 "on its face" does not contemplate pendent jurisdiction over other issues but §1292(a)(1) "on its face" does not contemplate pendent jurisdiction over the merits of the complaint, nor, for that matter, did the grant of jurisdiction under §303(b) of the Labor Management Relations Act of 1947 "on its face" contemplate the district courts would exercise pendent jurisdiction over Gibbs' state law claims against the United Mine Workers, *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). The touchstones remain "judicial economy, convenience, and fairness to litigants", 383 U.S. at 726, in all three cases.

Similarly, petitioner's "floodgates of appeals" argument, if it were indeed a genuine policy objection would apply equally well to jurisdiction pendent to a §1291(a)(1) appeal. Litigants would be encouraged to bring colorable, if not frivolous, claims or counterclaims for preliminary injunctions so as to secure interlocutory appellate review of a more serious but otherwise unappealable issues. The answer in either case is that pendent review is a matter of discretion which may be rightly exercised to prohibit "a waste of judicial resources", always an appropriate

policy consideration. The correct way to control the "floodgates of appeals" is to (i) insist that the jurisdictional requirements of both §1292(a)(1) and the *Cohen* doctrine be firmly adhered to; and (ii) exercise pendent jurisdiction only where "there has been no attempt to abuse the collateral order appeal opportunity", Wright, Miller, Cooper and Gressman, *supra*[11] and that the pendent issue is factually or legally closely related to the appealable issue.[12]

Foreclosing pendent review here would not have narrowed the "floodgates": Defendants, armed with a decision on point by this Court which had not heretofore been cited or construed in §1983 litigation, *Vogel v. Gruaz*, 110 U.S. 311 (1884), and a more recent opinion extolling the virtues of private witness immunity *Briscoe v. La Hue*, 460 U.S. 325 (1983), would hardly have not appealed the absolute immunity defense even if other issues could not be reviewed; the Second Circuit's "independent review" as petitioner has it at 9, simply recites the undisputed facts on the record before it. "[O]nce a case is lawfully before

---

[11] For example, faced with an appeal of "obviously little merit", the Fifth Circuit for that reason alone refused to consider pendent jurisdiction on other issues. *Shoja v. IND*, 679 F.2d 447, 451 (5th Cir. 1982); similarly, *Kenyatta v. Moore*, #83-4753 (5th Cir. 29 Oct. 1984) (frivolous absolute immunity appeal would not support pendent jurisdiction over qualified immunity).

[12] The "stringent" requirements, as the Second Circuit put it, *Port Authority Police Benevolent Association, Inc. v. The Port Authority*, 698 F.2d 150, 153 (2d Cir. 1983), of pendent appellate jurisdiction require that the initial order be "clearly appealable", *ibid.*, and the pendent issue be closely related to the appealable issue. *Ibid.* This is the essential doctrine followed by every appellate court. *E.g.*, *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 808 (5th Cir. 1982); *State of New York v. Nuclear Regulatory Com.*, 550 F.2d 745, 760 (2d Cir. 1977); *Jenkins v. Blue Cross Mutual Insurance, Inc.*, 522 F.2d 1235 (7th Cir. 1975). When the pendent issue is not closely related jurisdiction will not be exercised over it. *Shaffer v. Globe Protection, Inc.*, 721 F.2d 1121, 1124 (7th Cir. 1983); *Kershner v. Mazurkiewicz*, 670 F.2d 440, 445 (3d Cir. 1982) (*en banc*); *Loya v. INS*, 583 F.2d 1110, 1113 (9th Cir. 1978); *General Motors Corporation v. City of New York*, 501 F.2d 639, 644-47 (2d Cir. 1974).

a Court of Appeals, it does not lack power to do what plainly ought to be done." *Mercury Motor Express, Inc. v. Brinke*, 475 F.2d 1086, (5th Cir. 1973), quoting 9 Moore's Federal Practice 110.25[1](2d Ed. 1972).

## II

## THE APPLICATION OF THE COLLATERAL FINAL ORDER DOCTRINE TO A COMMON LAW ABSOLUTE IMMUNITY DOES NOT WARRANT REVIEW BY THIS COURT

Although petitioner argues that "[l]ower courts need guidance from this Court as to the applicability of the *Cohen* collateral order doctrine to denial of [common law] absolute immunity claims", he cites no such lower court needing any such guidance. No lower court has ever imagined that the collateral finality of the denial of absolute immunity might turn on the common law versus constitutional nature of the immunity for several excellent reasons.[13]

Most important, nothing in the *Cohen* formula as repeatedly cited by this Court has ever incorporated a "constitutional" examination of the issue raised. The right asserted in *Cohen* to have the plaintiff shareholder post a bond for litigation costs was clearly of statutory, not constitutional, dimension. Similarly, the defendants in *Eisen*, objecting to being assessed with 90% of the cost of class notice, asserted issues strictly under Federal Rules of Civil Procedure 23. The right vel non of a private

---

[13] Every Court which has addressed the issue has held that an order denying a defense of absolute immunity is immediately appealable. *E.g.*, *Strothman v. Gefreh*, 739 F.2d 515, 517 n.1 (10th Cir. 1984)' *Chavez v. Singer*, 698 F.2d 420, 421 (10th Cir. 1983); *William v. Collins*, 728 F.2d 721, 724-26 (5th Cir. 1984); *Bever v. Gilbertson*, 724 F.2d 1083, 1086 (4th Cir. 1984). The circuits are divided however, whether an order denying a defense of qualified immunity is immediately. *See Kenyatta v. Moore*, #83-4753 (5th Cir. 29 October 1984) (collecting cases). The appealability of a denial of qualified immunity is before this Court in *Mitchell v. Forsyth*, #84-335, *cert. granted*, 29 October 1984, 53 U.S.L.W. 3324.

witness to be free of retaliatory frivolous litigation is clearly just as important as the rights at stake in *Cohen* or *Eisen*. No good reason is put forward why absolute immunity from suit, unlike any other potential *Cohen* issue, should be appealable only if constitutionally based.

Second, the absolute immunity of Judges, *Pierson v. Ray*, 386 U.S. 547 (1967), and prosecutors, *Imbler v. Pachtman*, 424 U.S. 429 (1976), two very frequent targets of §1983 suits, is not constitutionally based. Adoption of San Filippo's suggestion would mean they can no longer test their immunity from suit on interlocutory review.

Third, requiring a "constitutional" test for *Cohen* appeals would create much needless constitutional analysis simply to determine the threshold issue of jurisdiction. Immunity decisions reflect a subtle interrelationship of constitutional and common law antecedents. *See, e.g., Smith v. McDonald*, 737 F.2d 427 (4th Cir. 1984), *cert. granted*, #84-476, 53 U.S.L.W. 3404 (26 November 1984), construing the petition clause in light of common law principles. It has been heretofore unnecessary to decide for example, to what extent the absolute immunity recognized in *Butz v. Economou*, 438 U.S. 478, 512 (1978), is of a "constitutional" or "common law" dimension. Adopting a constitutional test for jurisdiction over *Cohen* appeals would make this necessary.

Indeed, in this very case the absolute immunity defense has constitutional underpinnings. The only serious question regarding the application of *Briscoe* is whether absolute immunity applies only to testimony on the stand. Respondents argued in the district court and the Second Circuit that the immunity for off the stand contacts between the DA and the two witnesses was an aspect of the informers' privilege and that there was

indeed, a "constitutional right to inform",[14] thus in the case at bar a difficult source of law question would have to be determined as an ingredient of the threshold issue of jurisdiction.

In short, no lower court has ever expressed a need to determine whether the *Cohen* doctrine turns on the "constitutional" or common law basis of the asserted immunity. If any court were ever to raise the question, only one answer could be given. The issue neither warrants nor deserves this Court's review.

## CONCLUSION

A writ of certiorari should not issue to review the order of the Second Circuit.

New York, New York
13 December 1984

Respectfully submitted,

BARRY, MCTIERNAN & MOORE
*Attorneys for*
*United States Trust*
*Company of New York,*
*J. Gregory Van Schaack and*
*Bruce P. Dennen*
115 Broadway
New York, New York 10006
(212) 964-4270

MICHAEL F. CLOSE
*Counsel for Respondents*

---

[14] Citing below *inter alia*, *Re Quarles*, 158 U.S. 532, 535-36 (1895); *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1342-43 (7th Cir. 1977), *cert. denied*, 434 U.S. 975 (1977) (constitutional right to complain to IRS about its employee; tort action dismissed); *Rusack v. Harsha*, 470 F. Supp. 285 (M.D. Pa. 1978) ("right to inform" is analogous to First Amendment right to petition); *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961); *Brown v. Glines*, 444 U.S. 348, 361 (1980) (Brennan, J., dissenting).

No. 84-763

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

---

AUGUSTIN J. SAN FILIPPO,

*Petitioner,*

v.

U.S. TRUST COMPANY OF NEW YORK, INC.,
J. GREGORY VAN SCHAACK and BRUCE DENNEN,

*Respondents.*

---

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

---

## PETITIONER'S REPLY BRIEF

---

EUGENE GRESSMAN
School of Law
University of North Carolina
Chapel Hill, N.C. 27514
(919) 962-4120
*Counsel for Petitioner*

January 15, 1985

CASILLAS PRESS, INC. . WASHINGTON, D.C. 20036 . (202) 223-1220

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases:** **Page**

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

---

**No. 84-763**

---

AUGUSTIN J. SAN FILIPPO,

*Petitioner,*

v.

U.S. TRUST COMPANY OF NEW YORK, INC., J. GREGORY VAN SCHAACK and BRUCE DENNEN,

*Respondents.*

---

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

---

## PETITIONER'S REPLY BRIEF

---

In reply to the Respndents' Brief in Opposition to Certiorari in No. 84-763, Petitioner states as follows:

### I

**Respondents concede a conflict in the circuits as to the existence of "pendent appellate jurisdiction" in civil cases.**

Buried in footnote 10 on page 8 of the Brief in Opposition is a concession that there is "an apparent conflict in the circuits" over the existence of "pendent appellate jurisdiction" in civil appeals once a collateral final order has given a court of appeals jurisdiction under § 1291.

In that footnote, Respondents acknowledge the correctness of Petitioner's claim (Pet. 11) that the decision of the Second Circuit in this civil case conflicts with the Third Circuit's ruling in two civil appeals – *Akerly* v. *Red Barn System, Inc.*, 551 F.2d 539, 542-543 (3rd Cir. 1977), and *Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1209 (3rd Cir. 1979). Moreover, Respondents commendably admit that the decision below also conflicts with a criminal case from the Ninth Circuit, *United States* v. *Yellow Freight System, Inc.*, 637 F.2d 1248, 1251 n.2 (9th Cir. 1981). In the latter ruling, the Ninth Circuit held that the immediate appealability of a criminal pretrial order, qualifying as a collateral final order under § 1291, "will not confer pendent appellate jurisdiction over defendants' other claims." 637 F.2d at 1251. And in footnote 2 of the Ninth Circuit's opinion, the court rejected a contention that *Abney* imposes "no blanket prohibition of pendent appellate jurisdiction but merely held that pendent review was inappropriate in that case." Subsequent cases, said the Ninth Circuit, "have not adopted so narrow a reading of *Abney*."[1]

Such an acknowledged conflict among the circuits highlights the appropriateness of granting certiorari on the "pendent appellate jurisdiction" issue.

---

[1]The subsequent cases cited by the Ninth Circuit were this Court's decision in *United States* v. *MacDonald*, 435 U.S. 850, 857 n.6 (1978), and lower court decisions in *United States* v. *Klein*, 582 F.2d 186, 196 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *United States* v. *Cerilli*, 558 F.2d 697, 699-700 (3rd Cir. 1977), *cert. denied*, 434 U.S. 966 (1977).

## II

### Respondents do not deny that the decision below conflicts with this Court's decision in Abney.

The Respondents do not and cannot deny the basic conflict between the Second Circuit's "pendent appellate jurisdiction" concept and the § 1291 jurisdictional limitations announced in *Abney* v. *United States,* 431 U.S. 651, 663 (1977). As later reiterated in *United States* v. *MacDonald,* 435 U.S. 850, 857 n.6 (1978), *Abney* stands for the proposition "that a federal court of appeals is without pendent jurisdiction over otherwise non-appealable claims even though they are joined with a double jeopardy claim over which the appellate court does have interlocutory appellate jurisdiction."[2] That *Abney* proposition is at war with the Second Circuit's decree that it has pendent jurisdiction over "otherwise nonappealable issues" that overlap the issues involved in an appealable collateral final order of the *Cohen* variety.

Respondents suggest, however, that the *Abney* doctrine has "particular force in criminal prosecutions" and thus should have no application to civil cases. Such a distinction between criminal and civil cases is belied by the Third Circuit decisions, concededly in conflict with the decision below (see Point I above), that have rejected the use of pendent jurisdiction on the appeal of a collateral final order in civil settings. The distinction itself is highly questionable, if for no other reason than the fact that both criminal and civil collateral orders owe their appealability to the same statute, § 1291. Indeed, the collateral final

---

[2]Applying the *Abney* doctrine, *MacDonald* held that the appealability of a collateral final order denying a double jeopardy claim confers no pendent jurisdiction to consider a denial of a speedy trial claim. 435 U.S. at 857 n.6.

order doctrine itself originated in a civil case, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and has frequently been applied in both criminal and civil appeals under § 1291. With such common ancestry, how can a collateral civil order produce pendent offspring, while a collateral criminal order cannot?

In any event, if pendent jurisdiction is to be recognized and exercised in civil appeals, as Respondents propose, that determination should be made by this Court, rather than left to the conflicting vagaries of lower court litigation. All of which augments the appropriateness of granting certiorari to resolve this growing § 1291 jurisdictional enigma.

Respondents' further reliance on *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974), is misplaced. In *Eisen*, an order imposing costs for notification to prospective class members was deemed an appealable collateral order. This Court held that the court of appeals "therefore had jurisdiction to review fully the District Court's resolution of the class action notice problems in this case," which included a construction of Civil Rule 23(c)(2). 417 U.S. at 172.

But in footnote 10 of the *Eisen* opinion, 417 U.S. at 172, the Court carefully eschewed consideration of "whether the Court of Appeals correctly reached the issues of manageability and fluid-class recovery, or indeed, whether those issues were properly before the Court of Appeals under the theory of retained jurisdiction." *Eisen,* in other words, potentially involved a quite different problem of whether a court of appeals retains some aspects of jurisdiction following a remand to a district court; and even that problem was not reached by this Court. In no way can *Eisen* be said to be a precedent by this Court for

the exercise of "pendent appellate jurisdiction" by a court of appeals in a civil appeal from a collateral final order.

Finally, Respondents' claim (Opp. Br. 7) that this Court has exercised pendent appellate jurisdiction "in other contexts" is quite beside the point. The problem here is whether courts of appeals have pendent jurisdiction in the collateral order context of § 1291, not whether this Court has pendent jurisdiction "in other contexts" under § 1254 (which it undoubtedly has).

To repeat, *Abney* flatly contradicts the Second Circuit's pendent jurisdiction concept here exercised. Certiorari should be granted.

## III

**It is not necessary to consider the facts or the conclusions reached by the Second Circuit as to whether the Petitioner stated a cause of action under § 1983.**

Respondents, like the court below, state a variety of "facts" that diametrically oppose those set forth in summary fashion by the Petitioner herein. Most of those so-called "facts" stem from a reading of excerpts from the criminal trial record, not from the pretrial record so far compiled in this § 1983 action. Most of the facts concerning the alleged § 1983 conspiracy have yet to be developed; they are not to be found in the record of the prior criminal proceeding, in which Petitioner was totally acquitted.

It is quite unnecessary for this Court to inquire into the facts that relate to whether Petitioner has stated a § 1983 cause of action.[3] That is the issue that the Second Circuit

[3]Petitioner has conditionally preserved, as the fourth Question Presented, the issue whether the Second Circuit abused its discretion

resolved in exercise of its "pendent appellate jurisdiction." If the *Abney* doctrine applies to this civil appeal, the Second Circuit would lack jurisdiction to reach or resolve what it conceded to be an "otherwise nonappealable issue." Since this issue is one that can be preserved for resoluton after further proceedings in the trial court, the remedy that Petitioner seeks from this Court is simply a reversal of the judgment of the Second Circuit and a remand for further § 1983 proceedings. See *United States* v. *MacDonald,* 435 U.S. 850, 863 n.9 (1978).

## CONCLUSION

For the reasons expressed herein, as well as those in the Petition for Certiorari, a writ of certiorari should issue to review the judgment of the Second Circuit in this case.

Respectfully submitted,

EUGENE GRESSMAN

School of Law
University of North Carolina
Chapel Hill, N.C. 27514
(919) 962-4120

*Counsel for Petitioner*

---

in making an independent examination of the incomplete record to determine if a § 1983 cause of action has been stated. That question need not be reached, however, if it is determined that the Second Circuit had no jurisdiction to resolve it.

# SUPREME COURT OF THE UNITED STATES

84–763 (5) AUGUSTIN J. SAN FILIPPO
*v.*
UNITED STATES TRUST COMPANY OF NEW YORK ET AL.

84–1018 (4) UNITED STATES TRUST COMPANY OF NEW YORK ET AL.
*v.*
AUGUSTIN J. SAN FILIPPO AND ROBERT M. MORGENTHAU, DISTRICT ATTORNEY FOR COUNTY OF NEW YORK

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 84–763 AND 84–1018. Decided March 4, 1985

The petitions for writs of certiorari are denied.

JUSTICE WHITE, dissenting.

Petitioner Augustin San Filippo sued respondents, United States Trust Company and two of its officers, under 42 U. S. C. § 1983 for malicious prosecution. Petitioner alleged that the U. S. Trust officers had conspired with a New York County Assistant District Attorney to present false testimony to a grand jury that was investigating petitioner's alleged fraud in obtaining loans from U. S. Trust for two of his clients. Although the grand jury had returned an indictment against petitioner, a jury had subsequently acquitted him of all charges.

Respondents asserted several affirmative defenses in the United States District Court for the Southern District of New York, including their absolute immunity from § 1983 liability for their grand jury testimony or prior discussions with the prosecutor. Partly on the basis of this claimed immunity, they sought a protective order against further discovery and also moved for dismissal or summary judgment. These motions were denied by the District Court, and

respondents appealed. The United States Court of Appeals for the Second Circuit held that the denials of these motions were properly before it under the "collateral final order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949), at least insofar as they were premised on a rejection of the defendants' absolute immunity defense. 737 F. 2d, at 254. On the merits, the Court reasoned that respondents were entitled to absolute immunity for their actual testimony before the grand jury, citing *Brisco* v. *LaHue*, 460 U. S. 325 (1983), but not for any extra-judicial conspiracy between themselves and the prosecutor leading to the giving of the allegedly false testimony. The Court then went on, however, to hold that San Filippo's "completely unsubstantiated allegations of conspiracy" were insufficient to state a valid claim for relief under § 1983. Recognizing that this ground for relief did not "in its own right merit interlocutory review under *Cohen*," the Court held that it had jurisdiction to consider the issue "under the doctrine of pendent appellate jurisdiction," and determined to exercise that jurisdiction in this case in view of "the waste of judicial resources" were the suit to go forward on remand.

In reaching that holding, the Court of Appeals failed to mention our decision in *Abney* v. *United States*, 431 U. S. 651 (1977). In that case, we held that a court of appeals may exercise jurisdiction under *Cohen* over an appeal from a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds. We further concluded, however, that this jurisdiction did not extend to "other claims presented to, and rejected by, the district court in passing on the accused's motion to dismiss." *Id.*, at 663. We specifically cautioned that "such claims are appealable if, and only if, they too fall within *Cohen*'s collateral-order exception to the final-judgment rule." Any other rule, we reasoned, would encourage the assertion of frivolous but appealable claims in

order to obtain premature appellate review of otherwise unappealable "pendent" claims.

The decision below is clearly in tension with our rationale in *Abney*. Moreover, it is in direct conlfict with the holding of the Court of Appeals for the Third Circuit in *Akerly* v. *Red Barn System, Inc.*, 551 F. 2d 539, 542–543 (CA3 1977). In *Akerly*—like this, a civil case—the Third Circuit concluded that a district court's refusal to disqualify counsel was a "collateral order" under 28 U. S. C. § 1291, and that it therefore had appellate jurisdiction to rule on the issue. The Court refused, however, to extend its jurisdiction to the district court's denial of a motion to dismiss. Recognizing that it would have asserted jurisdiction over this separate issue if the appeal had arisen under 28 U. S. C. § 1292(b), the Third Circuit reasoned that the governing principle behind the collateral order doctrine was not judicial efficiency, but the separability of the order from the remainder of the case. Furthermore, the collateral order doctrine was to be sparingly applied. 551 F. 2d, at 543. See also *Forsyth* v. *Kleindienst*, 599 F. 2d 1203, 1209 (CA3 1979). But see *Metlin* v. *Palastra*, 729 F. 2d 353 (CA5 1984); *Dellums* v. *Powell*, 660 F. 2d 802, 804, n. 6 (CADC 1981).

These cases betray confusion among the lower courts concerning the proper application of *Abney* to appeals arising under the *Cohen* doctrine. I would grant certiorari to clarify the law concerning this important and frequently recurring question.*

JUSTICE POWELL took no part in the consideration or decision of these petitions.

---

*Respondents have filed a conditional cross-petition. I would also grant certiorari on the cross-petition, limited to the first question presented—the only question actually resolved by the Court of Appeals. That question is whether the courts below erred in rejecting absolute immunity for respondents for their off-the-stand contacts with the Assistant District Attorney, leading to their allegedly false testimony before the grand jury.